TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1957

No. 84

FRANK MASCIALE, PETITIONER

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petition for Certiorari
Filed October 20, 1956
Certiorari Granted February 25, 1957

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 84

FRANK MASCIALE, PETITIONER

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

	Original	Print
Record from the United States District Court for the Eastern District of New York	A	1
Statement of docket entries	A	1
Indictment	C	2
Transcript of testimony	F	5
Appearances	F	5
Testimony of Eugene J. Marshall, direct	17	5
cross	39	16
redirect	67	26
Paul Goldman, direct	75	27
Walter Seifert, direct	84	30
cross	100	38
redirect	114	42
David W. Costa, direct	128	42

	Original	Print
Government rests	143	48
Motion to dismiss and denial thereof	143	48
Testimony of Frank Masciale, direct	145	49
cross	209	85
redirect	224	93
recross	229	96
Defendant rests	232	96
Renewal of motions and denial thereof	232	96
Charge of the Court	262	97
Defendant's request to charge	281	108
Government's requests to charge	283	109
Verdict	285	110
Motion to set aside verdict and denial thereof	286	111
Judgment and commitment	287	111
Proceedings in the United States Court of Appeals for the Second Circuit	289	113
Opinion, Hincks, J.	289	113
Dissenting opinion, Frank, J.	294	117
Judgment	299	120
Clerk's certificate (omitted in printing)	300	121
Order extending time to file certiorari	301	121
Order granting leave to proceed in forma pauperis and petition for writ of certiorari	302	122

A IN THE UNITED STATES DISTRICT COURT
FOR ~~THE EASTERN~~ DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, *Plaintiff*,

against

FRANK MASCIALE, *Defendant*.

Statement of Docket Entries

DATE	PROCEEDINGS
1955	
Jan. 17	Indictment filed.
	* * * * *
Jan. 24	Before Galston J. Deft Masciale and Attorney present. Deft produced in accordance with writ. Deft arraigned, plea not guilty, case adjd to Feb. 7, 1955. Deft to be returned on that date, Deft Seifert not present, case adjd to Jan. 25, 1955.
	* * * *
Mar. 17	Before Abruzzo J. Deft Seifert and Counsel present. Deft withdraws plea of not guilty and after having been warned of his rights, on his own behalf and through his counsel, enters plea of guilty, to counts 3 and 5. Bail continued and sentence adjd to March 24, 1955
	* * * *
B Sept. 27	Before Byers J. Deft Masciale present. Trial ordered. Counts 1-2 and 4 are severed as against Deft Seifert on motion of Asst. U.S. Atty McCann. Trial adjd to Sept. 28, 1955.
Sept. 28	Before Byers J. Deft Masciale present. Trial resumed. Trial adjd to Sept. 29, 1955.
Sept. 29	Before Byers J. Deft Masciale present trial resumes and adj to Sept. 30, 1955.
Sept. 30	Before Byers J. Deft Masciale present. Trial resumed case reopened on motion of the Deft. Jury retire. Jury return and render a verdict of guilty on each of counts 2-3-4 and 5. Motion made to set verdict

aside, and denied as to count 2-3 and 5 as charged, and decision reserved as to count 4. Sentence adjd to October 13, 1955. Bail continued.

* * * * *

Oct. 13—Before Byers J. Defts Masciale and Seifert present and Counsel present. Defts Masciale and Seifert sentenced to be imprisoned as follows: *Masciale* to 3 years imprisonment and $100 fine on each of counts 2-3 and 5. *Seifert* to 2 years imprisonment and $100 fine on each of counts 3 and 5. Each Deft to stand committed until fines are paid or discharged as provided by law. Court grants Defts motions to dismiss count 4 as to each Deft. On motion of Asst U.S. Attorney McCann, counts 1 and 2 are dismissed as to Deft Seifert. Sentences as to each Deft to run concurrently.

* * * * *

Oct. 21—Notice of Appeal filed by Deft Masciale.

C IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Cr. No. 43820

(Title 18 United States Code, Section 2; Title 21, United States Code, Section 174; Title 26, United States Code, Sections 2553(a), 2554(a); Title 49, United States Code, Section 781)

Indictment—Filed Jan. 17, 1955

THE GRAND JURY CHARGES:

COUNT ONE

That on or about the second day of March, 1954, within the Eastern District of New York, the defendant, WALTER SEIFERT, did sell and facilitate the sale of a narcotic drug, to wit: one (1) ounce and one hundred six (106) grains of heroin hydrochloride, a derivative of opium, knowing the same to have been imported contrary to law. (Title 21, United States Code, Section 174.)

COUNT TWO

That on or about the second day of March, 1954, within the Eastern District of New York, the defendants, WALTER SEIFERT and FRANK MASCIALE, did unlawfully sell a narcotic drug, to wit: one (1) ounce and one hundred six (106) grains of heroin hydrochloride, a derivative of opium, which said heroin hydrochloride was not in or from an original package bearing tax stamps required by law. (Title 26, United States Code, Section 2553(a).) (Title 18, United States Code, Section 2.)

COUNT THREE

That on or about the second day of March, 1954, within the Eastern District of New York, the defendants, WALTER SIEFERT and FRANK MASCIALE, did unlawfully sell a narcotic drug, to wit: one (1) ounce and one hundred six (106) grains of heroin hydrochloride, a derivative of opium, not in pursuance of a written order on a form issued by the Secretary of the Treasury. (Title 26, United States Code; Section 2554(a); Title 18, United States Code, Section 2.)

[2] COUNT FOUR

That on or about the second day of March, 1954, within the Eastern District of New York, the defendant, WALTER SEIFERT and FRANK MASCIALE, did use a motor vehicle, to wit: a 1950 Chevrolet Sedan, bearing 1954 New York license no. N.S. 6867, to facilitate the sale of a narcotic drug, to wit: one (1) ounce and one hundred six (106) grains of heroin hydrochloride, a derivative of opium, such narcotic drug being a contraband article. (Title 49, United States Code, Section 781; Title 18, United States Code, Section 2.)

COUNT FIVE

That from a date unknown to the Grand Jurors and continuing to and including the second day of March, 1954, within the Eastern District of New York, the defendants, WALTER SEIFERT and FRANK MASCIALE, did knowingly, wilfully, and unlawfully conspire together and with each other, and with others, to the Grand

Jury unknown, to sell a narcotic drug, to wit: one (1) ounce and one hundred six (106) grains of heroin hydrochloride, a derivative of opium, knowing the same to have been imported contrary to law, in violation of Title 21, United States Code, Section 174. (Title 21, United States Code, Section 174.)

In pursuance of such unlawful conspiracy and for the purpose of effecting the objects of said conspiracy, the said defendants committed the following:

OVERT ACTS

1. On or about March 1, 1954, the defendants, FRANK MASCIALE and WALTER SEIFERT, did meet at Carlucci's Restaurant, 1849 Eastern Parkway, Brooklyn, New York, and did have a conversation concerning the sale of narcotics.

[-3-] 2. On or about March 1, 1954, the defendant, WALTER SEIFERT, did make a telephone call to a person to the Grand Jury unknown.

3. On or about March 2, 1954, the defendants, FRANK MASCIALE and WALTER SEIFERT, did meet and did have a conversation concerning the sale of narcotics.

4. On or about March 2, 1954, the defendant, FRANK MASCIALE, did loan an automobile, to wit: a 1950 Chevrolet Sedan, bearing New York license no. N.S. 6867, 1954, to the defendant, WALTER SEIFERT, for the purpose of facilitating the sale of narcotics.

A TRUE BILL.

MORRIS L. COOK
Foreman

LEONARD P. MOORE
United States Attorney

F UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Cr. No. 43820

UNITED STATES OF AMERICA, *Plaintiff*,

vs.

FRANK MASCIALE and WALTER SEIFERT, *Defendants*.

TRANSCRIPT OF TESTIMONY

Brooklyn, New York,
September 27, 1955

Before:

HONORABLE MORTIMER W. BYERS, U.S.D.J., and a Jury

APPEARANCES:

LEONARD P. MOORE, ESQ.,
United States Attorney for the Eastern District of New York, For the Government,

By MARIE McCANN,
Assistant United States Attorney.

NICHOLAS LA CARRUBBA, ESQ.,
Attorney for Defendant.

* * * * * * * * * * *

17 EUGENE J. MARSHALL, a witness called on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Miss McCann:

Q. Mr. Marshall, will you state your occupation for the jury please? A. I am a United States Treasury Enforcement Agent with the Federal Bureau of Narcotics.

Q. What duties are required by that office? A. The enforcement of the Federal narcotic laws, and the apprehension of violators.

Q. Mr. Marshall, I direct your attention to January 14, 1954. Did you at that time meet the defendant, Frank Masciale? A. Yes, I did.

Q. Will you describe to the jury the conversations which took place during that meeting? A. Yes.

The Court: When? When and where did you meet him, please?

The Witness: I first met Mr. Masciale on January 14, 1954, at approximately lunch time, 12:30 or there-
18 abouts, at the Park Ridge Bar, which is located at 75th Street and 13th Avenue in Brooklyn.

The Court: 75th Street and 13th Avenue, Park Ridge Bar; is that it?

The Witness: Yes, sir.

The Court: Was anybody else present?

The Witness: Yes, sir, there was; a man whom I knew as Jack Kowel.

By Miss McCann:

Q. Will you tell the jury what conversations took place at that time? A. Yes, sir. I was introduced to Frank and Frank was—Mr. Masciale was introduced to me as Chappie, C-h-a-p-p-i-e, I believe.

Q. By whom were you introduced? A. By this Jack Kowel.

The Court: What did he say?

The Witness: I don't remember. I don't think I can remember the exact words, your Honor. It was—

The Court: I am afraid you will have to suspend for a few minutes. We can't compete against the bull-dozers that are working in the street. You just govern yourself by the volume of sound. Stop when it is necessary, please.

The Witness: The substance, if I remember cor-
19 rectly, your Honor, was as follows: The introduction was—concerned was—"Chappie, this is Gene whom I told you about."

I say, I can't be sure of the exact words.

Chappie, Jack and I then sat down in one of the booths and almost immediately we started to discuss the narcotics traffic.

I told Chappie that I was interested in large quantities of drugs, heroin to be exact; and not as a street pusher, if I may quote, but that I had—I transacted my business—I posed as a seller out of New York City and I was only interested in good and large quantities, and he should

tell me right away if he is not the person to see, then we will finish this conversation pleasantly right then and there.

Q. Do you— A. Frank questioned me as to my knowledge of the narcotics traffic. I can't recall the exact questions right now, but the entire topic was to find out my extent of the narcotics traffic.

And then Mr. Masciale told me that primarily he was a gambler and that he was not a narcotics trafficker as such, that his business is mostly gambling but that he knew the right people in the narcotics traffic.

20 He further said that up to a week ago or a week prior—

Q. That would have been a week prior to January 14th? A. Prior to January 14th he knew or he had a very good source which could supply me with excellent quality of heroin but that somehow he had a falling out with these people.

He said, further, that he knew someone whom he considered high up in the narcotics traffic to whom he would introduce me and that I was able to get—and I can quote this—"88 per cent pure heroin" from this source.

The Court: Just a minute, please. Sorry.

The last part was "he knew someone."

(Answer read.)

The Witness: We then made arrangements to—for me to call Frank two or three days later, and Frank supplied me with a telephone number. If I can remember correctly this number was not the Park Ridge Bar and, if I may testify to it, I checked it with the telephone company and it was a candy store or stationery store not far from the Park Ridge Bar.

The Court: Do you know what that number was?

The Witness: I am sorry, sir, I can't remember. I have it in my notes. It was a Beach View Number but I can't remember the number.

21 Q. Was there any other conversation that took place at that first meeting that you can recall, Mr. Marshall? A. The conversation lasted approximately a half hour, and, in substance, I gave most of it. I can't

remember any more exact words which were or might have been said at the time.

Q. Did you call Mr. Masciale a few days later, as he had asked you to do? A. Yes, sir. Yes, ma'am, I did.

The Court: That is to say, you used the telephone number he had given you?

The Witness: Yes, sir.

The Court: How long after the 14th of January was that?

The Witness: About the 18th, I believe, of January.

By Miss McCann:

Q. Did you ask for Mr. Masciale when you got an answer at that number? A. I asked for Chappie, and if my memory serves me right I don't believe I spoke to him at this particular number.

I think the person who answered it said he wasn't there. I did reach him, though, at the Park Ridge Bar either on the same date or on a later date. I can't recall exactly.

22 Q. Can you recall the conversation at that time, Mr. Marshall? A. The phone conversation?

Q. Yes. A. In substance, yes. Frank told me he had not been able to—that he had not been able to secure the source of supply yet.

Q. Did he say anything else to you? A. I met him then.

Q. You met him? A. Yes, ma'am.

Q. Do you recall the date at which you met him? A. No, but between January 14 and March 1st I spoke to Frank I'd say at least ten times but—

The Court: Always over the phone?

The Witness: Over the phone with the exception of two occasions. I met him one evening in January, at which time we drove, at Frank's directions, oh, all through Brooklyn and I can't even remember how many streets we passed, and we discussed again the narcotics traffic and his inability to date of being able to introduce me to the right source of supply.

In fact, he stopped or he asked me to stop, I believe it was near Myrtle Avenue and he walked around the corner and he came back and said that he had just seen someone who he thought was good, but that this person

wouldn't help us out at this time but that we might
23 be able to do something at a later date.

Then I met him again, I believe in February, and we had a similar conversation.

On March 1st I telephoned Frank at the bar approximately early afternoon, at which time he told me that he had arranged something for that evening, and if I would pick him up approximately 7 o'clock on March 1st.

Q. Where were you to pick him up? A. Near the Park Ridge Bar.

At approximately 7 of March 1st my partner at the time, Agent Finlay, accompanied me and we met Frank on the corner of 75th Street and 13th Avenue.

Frank got into the car with us and, at his direction, we drove by the Belt Parkway to Eastern Parkway and Atlantic Avenue intersection and parked the car in front of Carlucci's Restaurant, which is—

Q. Do you recall the address of that restaurant? A. It is on Eastern Parkway approximately 100 feet from Atlantic Avenue.

* * * * * * * * * *

24 Q. When you arrived at that address, what happened? A. Frank told Agent Finlay and I to go into the restaurant and sit down and he would return shortly.

Within ten minutes he returned with Walter Seifert or Siefert.

We sat in a booth, and we again had a discussion concerning narcotics traffic, during which Seifert said he could supply Agent Finlay and myself with pure heroin but that it would cost us approximately $400 per ounce.

Q. Do you recall who introduced the subject of narcotics at that meeting? A. I am sorry, I can't recall who started talking first.

Q. Do you recall whether or not you spoke about anything else other than narcotics at that meeting? A. No. With the exception of Seifert asking Frank in front of us if Agent Finlay and I were O.K.—meaning, if I may testify to that, if we were trustworthy.

Q. Will you go on, then? You had settled on the price of $400 an ounce, is that right? A. That is correct.

Q. What further conversation was there at that
25 time? A. I attempted to get the ounce of heroin which constituted for us, or in the Government, a sample because again I told Seifert I was interested in large quantities and I wanted a sample to see how good the heroin was, and I wanted to get the heroin that evening.

The four of us left Carlucci's restaurant and drove in the Government car, oh, I would say about six blocks towards New York on Eastern Parkway. We stopped in front of a drugstore. Seifert and I got out, at which time Seifert made a telephone call. He had a conversation and then handed the phone to me.

The voice on the other phone informed me that for the time being he did not want to meet me until he was sure it was perfectly safe and that I should transact my initial dealings or should have my initial dealings with Walter.

Q. Was there any discussion during the course of that evening concerning the sharing of profits?

* * * * * * * * * * *

26 A. Seifert said he would take care of Frank and that is all the conversation we had concerning that particular subject.

Q. Now— A. To get back to the conversation following the telephone call, Seifert informed us that we would not be able to get the heroin that evening, but we made arrangements to meet Frank Seifert—and Seifert on the following morning, approximately 10 a. m.

On that date Agent Finlay and I drove to Atlantic Avenue and Eastern Parkway.

Q. Excuse me, just what date was that? A.
27 March 2.

Near the intersection on Atlantic Avenue, Frank and Seifert were sitting in a 1950 Chevrolet sedan.

The Court: Where did you say you met them?

The Witness: At Atlantic Avenue and Eastern Parkway, sir.

Q. At about what time was this, Agent Marshall? A. Approximately 10 a. m.

Q. Go ahead. What transpired when you met? A. Seifert demanded all of the money in advance, to which I refused, and after some bargaining we finally settled

that I would advance him two hundred of the four for the heroin.

At that time I was very hesitant to give him the money, and Frank said that Seifert was to be trusted; in fact that he, Frank, would give Seifert his car, the Chevrolet and Frank would stay with us until that—good faith that Seifert wouldn't run away with the money.

I gave Seifert $200 of official Government funds, and Seifert left the vicinity.

Frank, Agent Finlay and I waited—oh, excuse me. Going back, Seifert said he would be back within 20 minutes.

When an hour passed, we were greatly worried that Seifert ran away with the $200.

I told Frank of my fears, and about 11—11:15 I
28 think he felt the same way especially because he said, "Seifert has my car."

We then—or Frank then saw another person standing on Eastern Parkway. He called this person over and introduced him as Angelo. Frank, Angelo, and I had a conversation, which the substance was concerning Seifert; that we had given Seifert some money and he was supposed to be back an hour ago and he hadn't returned.

Angelo said he might be able to find him for us, and Frank, Angelo and I drove in Angelo's car to the Howard Bar.

Angelo got out, went into the bar, came back within a few minutes, and said that Walter had been there but he wasn't at this time.

Q. Where is the Howard Bar located? A. East New York Avenue and Howard Avenue, on East New York Avenue.

Q. Then what did you do? A. We returned to the intersection of Atlantic Avenue and Eastern Parkway.

At approximately quarter to one—12:30 or thereabouts —Frank said that he had a very important appointment which he had to keep and he couldn't remain with us.

He instructed me that when Seifert returned I should take the car and park in front of—park it in the
29 neighborhood, I think in front of the Occhino grocery store and give the keys to Angelo's mother, Mrs.

Occhino. He said Angelo was going to drive him to his appointment.

At approximately 2 p. m. Seifert returned.

Frank, in the meantime, had left.

Seifert returned and asked me to come with him. He wouldn't let Agent Finlay in the car, so I went alone.

Q. Was this in Frank's car? A. This was in Frank's car, in the Chevrolet.

We drove to Howard Avenue and near the intersection of New York Avenue and Howard Avenue he demanded the additional $200. The reason for this, he stated that he didn't—if anything happened, he didn't want to be caught with hot money. I gave him the additional $200.

He got out of the car and walked around the corner. He returned within, I would say, one or two minutes, got back into the car and drove to East 98th Street right off Sutter Avenue. He turned—he made a U-turn on East 98th Street and pointed to a Pepsi-Cola box which was located next door to an aquarium and the rear exit of a movie theatre.

He told me that in this Pepsi-Cola Box I would find a shoe box; and in the shoe box would be a brown paper bag; within the brown paper bag would be the heroin.

I walked over to the Pepsi-Cola box and extracted
30 the evidence.

I then walked approximately a half block down East 98th Street and into a bar where I tested the—

* * * * * * * * * * *

32 Q. Yes, go ahead, Mr. Marshall. A. I proceeded to a bar located on the corner of Sutter Avenue and East 98th Street, where I tested the contents of the envelope which was contained in the brown paper bag with a field reagent to show whether is contained any opiate derivative.

The Court: You say you proceeded to where?

The Witness: To a bar located at the intersection of Sutter Avenue and East 98th Street, I believe.

By Miss McCann:

Q. Would you describe that test to the jury, please? A. It is a small glass vial containing a Marquis reagent. I believe the chemist will be able to state further what a

Marquis reagent is. I believe sulfuric acid and formaldehyde. It is a glass vial which you break open. A very small amount of the liquid is in there. A grain is all that is needed of a—all that is needed is a grain of the powder. In fact, what I did here was just shake the envelope holding it thusly until some of the powder dropped
33 into the glass vial and I received the proper reaction to—the color—color test.

Q. What is that reaction? A. Anywhere from a pink to a dark purple.

Q. What does that indicate? A. It indicates a presence of opiates.

Q. Is that a standard test which is administered by all— A. A standard field test.

Mr. La Carrubba: I object to the form of the question, sir. I don't think the witness is qualified as to whether it is a standard test.

The Court: Let's see whether he is qualified.

How long have you been in the Narcotics enforcement Bureau?

The Witness: Seven years.

The Court: Have you ever conducted this test before?

The Witness: Yes, sir.

The Court: How many times?

The Witness: Over a hundred, sir.

By Miss McCann:

Q. Will you go on from that point, Mr. Marshall—from the testing of the substance? A. I walked out of the bar and saw Seifert standing across the street. I nodded
34 to him, indicating everything was all right, got back into Frank's car, and returned to Atlantic Avenue and Eastern Parkway.

Q. Did Seifert return with you? A. No, he did not. At that point, at Atlantic Avenue and Eastern Parkway I turned the keys of the Chevrolet over to Mrs. Occhino, rejoined Agent Finlay, and came back to the office.

The Court: You turned the car keys over to whom?

The Witness: A Mrs. Occhino, I believe. O-c-h-i-n-o. I am not positive of the spelling.

The Court: Have you told us anything about her up to now.

The Witness: Yes, sir.

The Court: I didn't get it.

The Witness: Prior to Frank's leaving, he instructed me to turn the keys of the car over to Mrs. Occhino, Angelo's mother.

The Court: Angelo's mother.

Thank you.

The Witness: I returned with Agent Finlay to the office of the Bureau of Narcotics where all the agents concerned in the case signed the evidence.

On the brown envelope which I handed you before—

35 By Miss McCann:

Q. Which is Government's Exhibit No. 1? A. —I placed the exhibit number, the date of purchase, and the time.

The Court: By "the envelope" you mean the brown paper bag?

The Witness: The brown envelope, sir.

The Court: Do you mean the bag or something else?

The Witness: The brown paper bag, sir.

I placed, as I stated, the time and the date on the exhibit and my name and the other agents signed that also.

I removed the inner envelope or the white envelope from the brown paper bag and did likewise and initialed it.

Q. Do you have that envelope with you, Mr. Marshall? A. Both of them. The inner. It was a double envelope.

Q. May I have the envelope, please.

Mr. Marshall, I ask you is this the inner envelope to which you are referring in your testimony? A. Yes, ma'am.

Q. Is that the envelope which contained the— A. Substance.

36 Q. —substance which you purchased? A. Yes, ma'am.

Q. Did you initial that envelope at the time? A. Yes, ma'am.

Q. And did you date it? A. Yes, ma'am.

Q. About what time of the day was this? A. As soon as we returned to the office. I purchased it at 2:15; it was probably about 3 p. m. when we got back to our office.

Miss McCann: At this time I would like to offer the inner envelope which has been identified by Agent Marshall as Government's Exhibit 2.

The Court: Any objection?
Mr. La Carrubba: No objection.

(The inner envelope above referred to was marked Government's Exhibit 2 and received in evidence.)

By Miss McCann:

Q. Was there another wrapping around this package? A. Yes, ma'am, there was.

Q. I show you this paper and ask you if you can tell the jury what it is. A. This is the wrapper which surrounded Government's Exhibit No. 2.

Q. Did you initial that paper? A. Yes, ma'am, I did.

Q. Did you date it? A. Yes, ma'am.

37 Miss McCann: At this time I offer this paper as Government's Exhibit 3.

Mr. La Carrubba: I have no objection.

(The wrapper above referred to was marked Government's Exhibit No. 3 and received in evidence.)

By Miss McCann:

Q. Mr. Marshall, after you signed and dated those papers Government's Exhibit 2 and Exhibit 3, what did you do? A. I placed—I removed the contents of the envelope and placed it—the substance—and placed it into glassine—substitute glassine envelopes. These glassine envelopes I sealed into this envelope (indicating).

Q. Are you referring to the large envelope you have there? A. Yes, ma'am.

Q. At what time did you seal them into that? Would you say it was immediately after or—. A. Immediately thereafter.

Q. Did you do that in the presence of any witnesses? A. Yes, ma'am. I weighed and sealed and removed the contents of the other envelopes with Government Agent Mercado and Agent Finlay.

Q. And, as I understand it, you put them into the smaller envelope which you then placed into the larger enve-

38 lope, is that correct? A. Into this larger envelope, that is correct.

Miss McCann: At this time I wish to offer the larger

envelope which Agent Marshall identified as Government Exhibit 4.

Mr. La Carrubba: No objection.

(The larger envelope above referred to was marked Government's Exhibit No. 4 and received in evidence.)

By Miss McCann:

Q. Mr. Marshall, after you placed the substance in the large envelope and sealed it, what did you do with that envelope? A. I placed it in a locked cabinet in our office, and on March 3 I removed it in the sealed condition, the same condition, out of this sealed cabinet—locked cabinet—and gave it to Agent Bennett to deliver it to the United States chemist.

Q. Could you tell the jury, please, who has access to that cabinet in which you locked it? A. My group leader and myself at that time.

Q. What did you do with the original glassine packages or paper wrappings? A. The original wrappers I tested for fingerprints.

* * * * * * * * * * *

39 Cross Examination

By Mr. La Carrubba:

Q. Mr. Marshall, you say you met Masciale along with one Jack Kowel. Who is Jack Kowel? A. Jack Kowel was a special employee of mine.

Q. Special employee of yours? A. Yes, sir.

Q. How long a time have you known Jack or Jake Kowel? A. Very short time prior to January 14.

Q. Would you say a short time, being two months? A. I doubt if even that long. Perhaps only—

Q. Less than two months? A. Less than two months.

Q. Were the duties of Jack Kowel to locate people who knew something about narcotics? A. Not in the true sense of the word. There were other circumstances involved as far as Kowel was concerned.

Q. Was Kowel under indictment? A. No, sir, not that I know of.

Q. Was he being paid by you? A. Only expenses.

Q. And by only expenses you mean a fixed remuneration

or just for taxicabs and the like? A. The latter.

40 Q. Just taxicabs? A. Well, if I may explain, when I saw him and he said he was out and spent $5 or $10 the previous night at a bar or whatever he needed, that is the amount of money I would give him.

Q. So that you took his word for how much he had spent? A. Yes, sir. It wasn't that much.

Q. But that was one of the rights or powers you have as an agent, to make disbursements of Government money? A. Yes, sir.

Q. Is that correct, sir? How did you meet Jack Kowel? A. He came into my office one day and he—

Q. Voluntarily? A. Voluntarily.

Q. Of his own free will? A. Of his own free will.

Q. Yes, and you had a conversation? A. And I had a conversation with him.

Q. And the nature of this conversation I assume is that he knew where he could locate pushers and the like? A. Yes, sir.

The Court: Is that word "pushers"?

Mr. La Carrubba: Pushers.

By Mr. La Carrubba:

Q. Now, pushers, Mr. Marshall, are people who go about the city selling narcotics, is that correct, sir? A. Yes, sir.

Q. Who have a source of supply which is pretty liquid.

41 I mean they know where to put their hands on drugs at most any time. A. Normally, yes.

Q. Is that correct? A. Yes.

Q. Normally. And Mr. Kowel knew the narcotic business, is that right, sir? A. I wouldn't say he knew it. He was familiar.

The Court: Will you read that question, please.

"Mr. Kowel—"

(Record read.)

By Mr. La Carrubba:

Q. By being familiar, you say that he knew who the pushers were, is that correct? A. Some of them.

Q. Prior to January 14, 1954, did Kowel tell you he had made a contact? A. Yes, sir.

Q. And this contact was Frank Masciale, is that correct? A. I didn't know him by that name at first but—yes, sir, it turned out to be Frank.

Q. How did he tell you? A. He told me that he had been an intermediary between Chappie, a man in Brooklyn, and another person in the Bronx for the sale of 700 ounces of quinine; and that he had arranged a meeting be-
42 tween Chappie and this person in the Bronx for the sale or the transaction of the quinine to be successful and that Kowel was the intermediary.

Q. I see. A. He told me that Chappie at that time told him that if he ever had anyone who was interested in purchasing narcotics, he should bring him over.

And I said to Jack, "Let's go and see Chappie."

Q. Do you know what the address of this Jack Kowel is? A. Right now, sir?

Q. At that time? A. I did know at the time, yes, sir. I can't remember now. It was somewhere in the Bronx, off Gun Hill Road, to be exact.

Q. Would it have been 1169 DeKalb Avenue in the Bronx? A. It could be. I can't be certain. I was there once.

Q. Do you know where this person is now? A. Last I heard, he was supposed to be in California somewhere.

Q. Was he married?

The Court: By this person, whom do you mean?

Mr. La Carrubba: We are referring to a Jack Kowel, this gentleman we are talking about at this time, sir.

The Witness: He was married. His wife had tuberculosis, and he had two children—and I think he had a boy
43 and a girl and he was afraid also that the boy was also contaminated with the disease, and I last saw him I think in the spring of 1954 when he told me that his wife was due out of the sanitarium very shortly and that New York was not the place for him, and he got a job as a truck driver or something like that on the West Coast, where he and his wife and his kids would be much better off because of the tuberculosis and—

Q. As a matter of fact— A. —that is the last I heard of them.

Q. As a matter of fact, Mr. Marshall, didn't he leave his wife and children and go to the West Coast by himself? A. It is possible. I don't know.

Q. Now, other than Frank Masciale, did Kowel introduce you to anybody else? A. Yes, sir; he did.

Q. How many did he introduce you to? A. Two.

Q. Was Seifert one of them? A. No, sir.

Q. Was Masciale one of these two? A. He was a third.

44 By Mr. La Carrubba:

Q. So that having known Jack Kowel some time prior to January 14, I believe you said, something under two months— A. If my memory is correct. I doubt very much that it was longer than that.

Q. And then you had no further contact with him after the spring of 1954; is that correct? A. Spring or early summer; that is correct.

Q. So that you lost contact of Jack Kowel after this alleged sale took place between yourself and Seifert? A. Well, some time thereafter.

Q. Yes. A. After the arrest I saw Kowel again, after the arrest of Frank and Seifert.

Mr. La Carrubba: I don't think I get his answer, sir.

The Witness: In other words, I lost contact with
45 him after I had arrested Frank and Seifert for the sale of March 2, 1954. It probably was some time in June or July when I last saw Kowel.

By Mr. La Carrubba:

Q. But you knew this man to be—and how do you describe this Jack Kowel? What did he look like, his age? A. He was—

Miss McCann: If your Honor please, I believe that is irrelevant. I object on that ground.

The Court: It may be proper cross examination.

Mr. La Carrubba: I think so, sir.

The Court: I see no objection to it.

The Witness: He was a middle-aged person, rather heavy set; graying. I would judge his age, late forties.

Q. Did he have a prior record? A. None that I could find.

Q. None that you could find? A. In other words, I

looked it up or I checked in our files and he had no previous conviction as to any narcotics violations.

Q. I see, so that you limited yourself to any narcotics convictions or that your records showed under the name of Jack Kowel? A. That is correct.

46 Q. Did you take his fingerprints? A. No, sir, I did not.

Q. Now, when you met on January 14th at the Park Ridge Bar, as a matter of fact didn't Jack Kowel do most of the talking at that time? A. No, sir, he did not.

Q. He didn't? A. No, sir.

Q. But he told you that this was the man that he had spoken to you about previously, is that correct, sir? A. That is correct.

Q. So he had talked to you about someone by the name of Chappie who lived in Brooklyn? A. Yes, sir.

Q. As a matter of fact, at the time they began—that you and Chappie and Kowel began to talk about the drug and the percentages, was it not Kowel who said the percentage of pure heroin he could get—meaning he, Frank, could get? A. No, sir.

Q. But you knew—at least Masciale had told you he was not in the narcotics business but he was a gambler? A. That's—

Q. Isn't that what you testified to? A. That is correct, sir.

* * * * * * * * * * *

47 By Mr. La Carrubba:

Q. You attempted to telephone Masciale at this number that he had given you, is that correct, sir? A. Yes, sir.

Q. And which you later found out was a candy store? A. Yes, sir.

Q. Did you not think it was strange—

The Court: What difference does that make?

The Witness: I will answer the question.

The Court: I know, but why take up time on whether he thought it was strange or not. He tried to telephone him there and didn't succeeed.

Mr. La Carrubba: Yes, sir, all right.

By Mr. La Carrubba:

Q. Then you contacted or telephoned Frank at home, did you not? A. No, sir, I didn't.

Q. You didn't call him at home? A. After his arrest, yes, sir, but not before.

48 Q. Before his arrest you never called him at his home? A. No, sir, I didn't have his home telephone number.

Q. But you knew it was listed, did you not? A. I didn't even know—

Q. In the telephone book? A. —his last name.

Q. You didn't know his last name? A. Not at that time, no.

Q. When did you know Frank's last name? A. The day I saw his Chevrolet car on March 2.

Q. Then you spoke to him about ten different times? A. Approximately.

Q. And you called him at the Park Ridge Bar, is that right, sir? A. Or I saw him, one of the two.

Q. But you telephoned him at the Park Ridge Bar? A. Yes, sir.

Q. How did you get that telephone number? A. The person who answered the telephone at the candy store said that he might be over at the Park Ridge Bar.

The first day I met Frank on January 14, he wasn't there when Kowel and I arrived there, and the bartender said that he is usually here every day about 12:30, 1 o'clock; and when I called him thereafter I got the telephone number of the Park Ridge Bar from the phone book.

49 Q. From the phone book? A. Yes, sir.

Q. And that is where you called Frank? A. Yes, sir. I beg your pardon, sir. May I qualify that?

I believe at one time he was at the candy store when I called, if my memory is right.

Q. These conversations that you had with him, isn't it a fact that Masciale told you he could not get any drugs? A. No, sir, he didn't say he could not get any drugs. He said he was still trying.

Q. Now, you have been in the Treasury Department you say seven years? A. Yes, sir.

Q. That would be about—you had about five years previous to this occurrence? A. Approximately.

Q. In the department. Were you out in the field those five years? A. Yes, sir.

Q. And you had gotten in contact with pushers and buyers and sellers and users? A. Yes, sir.

Q. During those five years, right, sir? A. Yes, sir.

Q. Now, when you met this boy, this Angelo Occhino, who introduced you to Angelo Occhino?

50 A. Frank.

Q. And did he tell you why you were going to use the services of Occhino? A. Well, we were all standing there together, the three of us in conversation.

Q. Did Masciale know where Seifert lived?

The Court: Please, don't ask this witness any mind-reading questions.

Mr. La Carrubba: Very well. May I rephrase it, please?

Q. Isn't it a fact that Occhino was called in to locate Seifert? A. That is correct.

Q. And that Masciale told you that he didn't know where Seifert lived? A. That is also correct.

Q. Right, sir. Now, this automobile that was used as you have testified, you know that to be the automobile of the sister of Frank Masciale, isn't that correct, sir? A. Yes, sir.

Q. It is not Frank Masciale's car? A. No, sir, it is not.

Q. And when Seifert requested to use the car, Masciale refused? A. No, sir, he did not.

51 Q. Did not? A. He gave him the keys. He gave him the car.

Q. Do you remember how Seifert got the car—the keys to the car, rather? A. I remember Frank saying that—

Q. Mr. Marshall— A. Just—

Q. Let me ask you this question.

The Court: Don't you want him—

Q. Isn't it a fact—

The Court: Don't you want him to answer that question?

Mr. La Carrubba: I will withdraw my question.

By Mr. La Carrubba:

Q. Isn't it a fact that Masciale threw the keys at Seifert? A. I can't recall that, sir.

Q. Now, how far away from East 98th Street was this bar that you took the contents of this envelope and poured

in this vial that you spoke about? A. It was on the street. It was approximately—was diagonally across the street from where I picked up the package.

Q. And all this time Masciale was not there? A. No, sir, he was not.

Q. Did Masciale remain with you up to the time that he left the area of Eastern Parkway? A. Yes, sir, I think he did.

52 Q. Did he tell you where he was going? A. Yes, he did.

Q. As a matter of fact, he came to my office that day, isn't that correct, sir? A. That is not what he told me, sir.

Q. All right, now, were you in contact with Seifert after March 2nd? A. Yes, sir, on one occasion.

Q. Were you in contact with Frank after March 2nd? A. About three days after March 2nd I communicated with Frank and complained to him about the quality of the heroin which he and Seifert had sold to me.

Mr. La Carrubba: I will object to the characterization of what who sold him, sir. I move to strike out that portion of the answer. I think that is the subject matter of this particular trial.

The Court: Well, would you object if the answer were he telephoned to Frank and complained about the quality of the contents of the envelope?

Mr. La Carrubba: That is right. That would be perfectly admissible. I would have no objection to that.

The Witness: All right, sir.

The Court: Will you substitute that?

The Witness: I communicated with Frank and—

The Court: You mean you telephoned him?

53 The Witness: Yes, sir.

The Court: When was that, please?

The Witness: This was, I would judge, three or four days after March 2nd.

The Court: March 5th or 6th?

The Witness: Approximately, your Honor. I can't be sure.

The Court: You spoke to him over the phone?

The Witness: I spoke to him on the phone.

The Court: Where did you call him?

The Witness: Pardon, sir?

The Court: Where did you call him?

The Witness: The Park Ridge Bar, I believe. And complained about the quality of the heroin.

The Court: What heroin?

The Witness: The heroin I had received on March 2nd.

The Court: Can you tell us what he said and what you said?

The Witness: Yes, sir, I think I can, in substance. I told him that I believed that my partner and I were, to use a colloquialism which I used, "set up" that the heroin which we received was worth only approximately 125—$150 tops and that the $400 which I paid was a highly
54 exorbitant fee or price, to put it mildly.

Frank said that he would get ahold of Seifert so that Seifert could straighten the matter out.

By Mr. La Carrubba:

Q. Did you speak to Frank after this conversation of March 5th or 6th? A. I believe I did. I can't be certain but it seems that I did.

Q. Were you able to contact him readily?

The Court: You mean "were you able to speak to him?"

By Mr. La Carrubba:

Q. Telephone, yes. A. That I can't recall. I mean there is a chance either way. I couldn't say one way or the other.

Q. When did you arrest the defendant, Frank Masciale? A. Close to a month after March 2nd. I can't remember the exact date right now.

Q. But around April 5th? A. Possible. It is very probable that was the day. I just can't recall for the moment.

Q. Where did the arrest occur? A. At home. At Frank's home.

. . . . . .

56 By Mr. La Carrubba:

Q. Now, from March 2 to April 5 of 1954, did you conduct any further investigations with reference to this defendant, Frank Masciale? A. Yes and no. If I may qualify my answer—

Q. Did you conduct an investigation? A. Yes, sir, I did.

Q. What was the nature of this—
I withdraw that.
The Court: What did you do?
Did you mean what did he do?
Mr. La Carrubba: Yes.
The Court: In conducting the investigation.
Mr. La Carrubba: In conducting this investigation.
The Court: Why don't you ask him? He will tell you.

By Mr. La Carrubba:

Q. You heard the question. A. Yes, sir.
I attempted to locate and identify the—or—the source of supply of the Heroin which I received on March 2nd.
Q. Did you attempt to discover this through Frank Masciale? A. It is possible I did. I don't—I can't recall.
Q. As a matter of fact, Mr. Marshall, didn't you
57 satisfy yourself that this was—that Walter Seifer was the only source that Masciale had?
The Court: You are calling for the witness' mental operation.
Mr. La Carrubba: I grant you that, sir.
The Court: You could be right. He could have formed an opinion. His opinion might be right or his opinion may have been wrong. Where does that leave you?
Mr. La Carrubba: I withdraw my question.

By Mr. La Carrubba:

Q. On April 4 or 5, 1954, did you and I have a conversation in this building? A. I believe we did, sir.
Q. As a matter of fact, did you not tell me at that time that you believed that Masciale's source of supply was one Seifert?
Miss McCann: I object, your Honor. I do not believe that is relevant to this case.
Mr. LaCarrubba: I think it is, sir.
The Court: It may.
Mr. La Carrubba: I think it is material.
The Court: It may have some bearing. Objection overruled.
Did you make that statement?
58 The Witness: That is very, very possible that I did but there, again—

Mr. La Carrubba: I want—

The Witness: It is a yes or no answer?

By Mr. La Carrubba:

Q. It cannot be yes or no, Mr. Marshall? You did tell me that; you did make that statement to me in conversation. A. It is extremely possible. I do not deny making it.

* * * * * * * * * * *

67 By Miss McCann:

Q. Now, you also testified that after the sale was completed on March 2 you had another telephone conversation with Mr. Masciale. Will you tell us what the whole of that conversation is, please? A. After I had learned that the heroin which I had purchased was not of pure quality, I complained to Mr. Masciale and he indicated that he would try to get in touch—communicate with Seifert, and at either that conversation or at a later one he appeared to be—I think the word would be disgusted with Seifert.

Q. Did he indicate to you why he was disgusted

68 with Seifert? A. Yes, ma'am. I mean that he—

Mr. La Carrubba: May we establish the time and place of this alleged conversation, if your Honor please?

The Court: I suppose this is the one concerning which he testified on cross examination and he fixes it by being either March 3, March 5, or 6.

Mr. La Carrubba: That is right.

The Court: A telephone conversation.

Is that the one we are talking about?

The Witness: Yes, sir.

The Court: Don't say he indicated. If he said anything, quote him.

The Witness: I can't—I can't recall the exact words. In substance—

The Court: Can you recall the substance of what he said?

The Witness: Yes, sir. In substance, the substance was that he was angry with Seifert as I were—as I was for selling the poor grade heroin, and also stated that it wasn't his fault, meaning Masciale's fault, that the heroin was so bad.

By Miss McCann:

Q. Mr. Marshall, you testified on cross examination concerning a series of telephone calls which you made to
69 Mr. Masciale prior to the sale. Do you recall whether or not Mr. Masciale gave you any reason for being interested in making this sale? A. Yes, ma'am. He needed money.

Q. I beg your pardon? A. He said he needed money.

* * * * * * * * * * *

75 PAUL GOLDMAN, a witness called on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Miss McCann:

Q. Mr. Goldman, what is your occupation, please? A. I am employed as a chemist at the laboratory, at the United States Treasury Department.

Q. Will you briefly describe your duties to the jury. A. I perform general analytical work on various types of materials which are submitted to the laboratory.
76 These materials include alcoholic products and narcotics.

Q. How long have you been with the Department of the Treasury? A. Since 1935.

Q. How long have you been in the laboratory? A. Since 1935.

Q. Would you state your technical background, please? A. I have a B. S. Degree in chemistry.

Mr. La Carrubba: I will concede that Mr. Goldman is an expert and duly qualified to act and testify as a chemist.

The Court: And that includes his qualification to testify as an analyst?

Mr. La Carrubba: That is correct, sir.

The Court: Anything more you want than that concession?

Miss McCann: I think that is sufficient, your Honor.

By Miss McCann:

Q. Mr. Goldman, I show you Government Exhibit 4 in evidence, which is a large envelope, and I ask you whether

or not you have ever seen that envelope before? A. Yes, I have. That was delivered to the laboratory on March 3, 1954, by Narcotics Agent Lee Bennett, and it was
77 initialed by myself in the agent's presence.

I see my initials on the envelope.

The Court: Is that March 4, did you say?

The Witness: March 3, 1954.

The Court: Thank you.

By Miss McCann:

Q. Mr. Goldman, did you at any time open that envelope? A. I did.

Q. Will you tell the jury, please, what was contained in the envelope?

The Court: Having opened the envelope, what did you do next?

The Witness: I examined the contents of this exhibit, Government Exhibit 4, and found it to be—

The Court: Did you analyze it?

The Witness: I did an analysis.

The Court: Or test it, or what did you do?

The Witness: I analyzed it and I weighed the contents.

By Miss McCann:

Q. Could you describe briefly the tests which you administered? A. Yes. I did a series of color tests and crystal tests in order to identify the material in the white
78 powder, and the results of these tests indicated that there was heroin hydrochloride present mixed with some sugar.

Q. Did you also weigh the contents of that package? A. Yes.

Q. What was the result of that? A. The powder contained therein weighed roughly an ounce and a quarter. One and one quarter ounces.

Q. Mr. Goldman, in the course of your work as a Government analyst, do you have occasion to frequently analyze substances such as this? A. Yes, many times. Thousands of them, in fact.

Q. You stated that this was heroin plus sugar, is that correct? A. Yes.

The Court: You say sugar and milk or just sugar? I didn't get that.

The Witness: Milk sugar.

The Court: Milk sugar.

By Miss McCann:

Q. Is there any other substance which occurs as an adulterant on occasion? A. Yes. Very often, in addition to milk sugar, there is quinine present as an adulterant mixed with the heroin.

Q. After you finished your examination of this particular substance, what did you do? A. I reweighed
79 the powder and sealed it into a second locked, sealed envelope.

Q. Is that— A. Which is attached to Government's Exhibit No. 4.

Q. After you sealed that small envelope, what did you do with it? A. I placed the two envelopes in a Government vault where they have—on the laboratory premises, and they have remained there until I brought them to court today.

Q. How many people have access to that vault? A. Only the chemists who work at the laboratory.

Q. Mr. Goldman, I ask you to at this time open that smaller package and tell the jury whether or not it contains the substance which you placed in it at that time? A. Yes, there is a glassine envelope contained in this second locked, sealed envelope. This glassine envelope bears the same laboratory number, 87830, and my initials P. G.

Q. And that small envelope is the one that you sealed, is that correct? A. That is the one which I sealed into the second small locked, sealed envelope.

Miss McCann: At this time I would like to offer that.

The Court: Is the second envelope empty or does
80 it have anything in it?

The Witness: It has white powder in it.

Miss McCann: I offer the small envelope and its contents as Government Exhibit 5.

(The small envelope and contents were marked Government's Exhibit 5 and received in evidence.)

84 WALTER SEIFERT, a witness called on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Miss McCann:

Q. Mr. Seifert, are you named as co-defendant in the case now on trial along with Frank Masciale? A. Yes.

Q. Have you pleaded guilty to certain counts of the indictment? A. Yes.

Q. Are you now awaiting sentence? A. Yes.

Q. I am sorry, I have trouble hearing you. A. Yes.

Q. Did you agree voluntarily to testify on behalf of the Government? A. Yes.

Q. Were there any promises of immunity or promises of favor given to you? A. No.

85 Q. In connection with your testimony? A. No.

The Court: No promises or representations made by anyone?

The Witness: No, sir.

By Miss McCann:

Q. Mr. Seifert, how long had you known—

The Court: You can't talk against that bulldozer, young lady.

Q. Mr. Seifert, how long had you known Frank Masciale prior to March 1, 1954? A. About a month.

Mr. La Carrubba: What was the answer?

(Record read.)

By Miss McCann:

Q. Can you recall the circumstances surrounding your meeting on March 1, 1954? A. Yes.

Q. Would you tell the jury what they were, please, as closely as you can recall? A. Well, Frank came to me and said that he had a couple of fellows that he wanted me to meet.

Q. Did he tell you why he wanted you to meet them? A. No.

Q. Had you ever discussed narcotics with Frank

86 before? A. No.

Q. Had you ever told him that you knew where to get narcotics? A. No.

Q. Did he tell you any reason why he came to you? A. To get some narcotics.

Q. He did tell you that? A. Yes.

The Court: May I hear that answer?

The Witness: To get some narcotics.

The Court: Please.

(Record read.)

By Miss McCann:

Q. Can you remember about what time of day you first met Frank on March 1st? A. Oh, it was seven, eight o'clock at night.

The Court: Seven or eight o'clock?

The Witness: Yes, sir.

The Court: In the morning or at night?

The Witness: Night.

By Miss McCann:

Q. Where did you meet him? A. Atlantic and Eastern Parkway.

Q. Had you made a previous—

The Court: In the street or somewhere else?

The Witness: In the street.

87 Q. Had you made a previous appointment to meet him? A. No.

Q. After he met you, where did you go? A. We went into the Carlucci's restaurant.

Q. Do you know where that is located? A. On Eastern Parkway between Pacific and—

Q. I am sorry. A. On Eastern Parkway between Pacific Street and Atlantic Avenue.

Q. Did you go into Carlucci's restaurant? A. Yes.

Q. When you got in there, what happened? A. He introduced me to Tex and Gene. We sat down at the table.

Q. Were Tex and Gene already in there when you arrived? A. Yes.

Q. What conversation took place after you sat down at the table?

The Court: I am sorry, you have lost me completely. I don't know who Tex is and I don't know who Gene is.

By Miss McCann:

Q. Did you later find out who Tex and Gene were? A. Yes.

Q. Will you tell the jury, please? A. Tex Finlay and Gene Marshall.

Q. Did you later find out what their occupations
88 were? A. Yes.

Q. What? A. Government agents.

Q. When you sat down at the table with Mr. Marshall and Mr. Finlay and Mr. Masciale, do you recall the conversation that took place? A. We discussed getting some stuff.

The Court: How many people took part in that conversation?

The Witness: How many? You talking to me?

Miss McCann: Yes.

The Witness: Four.

The Court: You, Frank, Finlay, and Marshall, is that correct?

The Witness: Yes.

By Miss McCann:

Q. Can you recall that conversation? A. We discussed getting some stuff—selling some stuff.

The Court: Please speak up. You have got to talk against this bulldozer outside.

What was the conversation?

The Witness: About getting some stuff.

The Court: Who said what?

By Miss McCann:

Q. In substance, if you cannot remember exactly,
89 can you recall in substance what was said? A. We discussed about getting an ounce of stuff, the four of us.

Q. An ounce of stuff. What do you mean by stuff? A. Heroin.

Q. Can you recall a little bit more specifically what was said about getting this stuff? In other words, did you discuss price or anything? A. Yes.

Q. Relating to that? A. Yes.

Q. Can you recall what that discussion was? A. $400 for the ounce.

Q. $400 for the ounce. Can you recall why an ounce was the amount of stuff agreed upon?

The Court: What was said on that subject, you mean?

Miss McCann: Yes.

The Witness: I don't understand the question.

By Miss McCann:

Q. Did the agents tell you what amount they wanted?

The Court: Who first mentioned one ounce? Do you remember?

The Witness: No, no.

The Court: Did somebody?

The Witness: I don't recall, sir.

90 The Court: Was one ounce mentioned in the conversation?

The Witness: Yes.

The Court: Who was it mentioned it first?

The Witness: I don't recall, sir.

By Miss McCann:

Q. Did you agree upon a price for that ounce? A. Yes.

Q. What was the price? A. $400.

Q. Was there any other discussion at that time that you can recall? A. They wanted to get the stuff that night.

Q. What did you tell them? A. No, couldn't get it that night.

Q. Did you tell them why you couldn't get it that night? A. It was too late.

Q. Did you have any discussion about sharing the proceeds of this? A. Yes.

Q. Can you recall what that discussion was, in substance if you can't recall exactly? A. Well, pay $300 for the stuff and the rest we was supposed to split.

The Court: Will you give me the answer, please, Mr. Reporter?

91 (Record read.)

The Court: What do you mean by the rest?

The Witness: The other hundred.

The Court: What was the total price that was agreed?

The Witness: $400.

The Court: And are you saying—I am not trying to put any words in your mouth. I am trying to find out. Are you saying that it was agreed that the cost of the product would be $300 and the profit would be $100 and that would be split, is that what you are saying?

The Witness: Yes, sir. $400.

By Miss McCann:

Q. So that Mr. Marshall and Mr. Finlay were to pay you a total of $400, is that correct? A. Yes.

Q. Of which one hundred you were to split? A. Yes.

Q. With whom were you to split that one hundred? A. Frank Masciale.

Q. Can you recall in fact whether or not you ever did split it with Frank? A. I believe I did.

Q. Can you recall how long you were in Carlucci's
92 Restaurant? A. Maybe an hour, half hour. I don't—

Q. Do you recall any other incident that happened that night while Mr. Masciale, Mr. Finlay, and Mr. Marshall were still with you? A. I made a phone call to try to get the stuff.

Q. Do you recall to whom you made that telephone call? A. Yes.

Q. Would you tell the jury who that was? A. Harry Curtis.

The Court: Is the name Harry Curtis?

Miss McCann: That is correct, your Honor.

The Court: Where did you make the phone call?

The Witness: From the drugstore.

The Court: Not in this barroom?

The Witness: No.

By Miss McCann:

Q. You spoke to Harry Curtis on the telephone? A. Yes.

Q. Can you recall what you said to him and he said to you? A. I asked him if I could get the stuff tonight and he said no.

Then Mr. Marshall wanted to talk to him.

Q. Did you give the telephone receiver to Mr. Marshall? A. Yes.

Q. After Mr. Marshall finished talking with him,
93 did you have anything else to say to Mr. Curtis?
A. No.

Q. Did you make any arrangement with Mr. Curtis on the telephone to meet him the following day? A. Yes.

Q. Could you tell the jury, please, just what that arrangement was? A. I was to meet him on East 98th Street.

Q. Was there any particular time set? A. Yes.

Q. Did you make any further arrangements with Mr. Marshall and Mr. Finlay that night? A. Yes.

Q. Will you tell the Court what they were, please? A. Supposed to meet them 10 o'clock in the morning, the next day.

Q. Where were you supposed to meet them? A. On Atlantic and Eastern Parkway.

Q. Did you in fact meet them the next day at that hour? A. Yes.

Q. Did you in fact meet them at the place agreed upon? A. Yes.

Q. Can you recall what happened after you met them? A. I took Frank's car and went over to meet Curtis.

The Court: Meet whom?

94 The Witness: Curtis.

By Miss McCann:

Q. Can you recall—

Miss McCann: Curtis, your Honor.

The Court: Curtis?

Miss McCann: Yes, sir.

By Miss McCann:

Q. When the agents first met you before you left to see Curtis, was Frank there with you? A. Yes.

Q. Can you recall any conversation you had before you left? A. I had no conversation.

Q. Whose car did you take to go meet Curtis? A. Frank's.

Q. Did you meet Curtis as agreed upon? A. Yes.

Q. Will you tell the Court what happened when you met Curtis? A. He told me where the stuff was.

Q. Did you see him put the stuff any place? A. No.

Q. Where did he—

The Court: Was the answer "no"?

The Witness: No.

By Miss McCann:

Q. Where did he tell you that the stuff was? A.
95 Told me it was in a Pepsi-Cola box by—under the el on East 98th Street next to a magazine—theatre.

Q. Do you remember the address of the building in front of which that box was? A. No, I don't.

Q. Where did you meet Curtis? Was it on the street, in a building, or— A. On the street.

Q. Did you give him any money at that time? A. Yes.

Q. How much money did you give him? A. $300.

Q. Where did you get that money from? A. Mr. Marshall.

Q. When did you get the money from Mr. Marshall? A. In the morning when I met him.

Q. When you met him in the morning? A. Yes.

Q. Did you get the whole $300 at that time or did you— A. No. I got two hundred then in the morning.

Q. When you first met Mr. Marshall, is that right? A. Yes.

Q. Was that before you left in Frank's car? A. Yes.

Q. When did you get the other hundred? A. Got the other two hundred when I came back to pick up Mr. Marshall.

Q. Can you remember about what time you came
96 back to pick up Mr. Marshall? A. One-thirty.

Q. Was Mr. Masciale there at that time? A. No.

Q. When you picked up Mr. Marshall, can you recall what you said to him? A. I asked him for the other $200.

Q. Did he give it to you? A. Yes.

Q. Then what did you do? A. Mr. Marshall got in the car with me.

Q. Is this still in Frank's car? A. Yes.

Q. Where did you go? A. Went to East 98th Street.

The Court: Is that 98th Street?

The Witness: Yes.

The Court: Is that the answer?

The Witness: Yes.

By Miss McCann:

Q. When did you get the other $200? A. When he got in the car with me.

Q. My understanding of what you said was that you got

$200 when you first left and then you got the other two hundred when— A. I came back for Mr. Marshall.

Q. Did you make any stops on the way to East 98th Street? A. Yes.

97 Q. Where did you go? A. Stopped off on Howard Avenue.

Q. For what purpose? A. I left $200 with a friend of mine.

Q. Was that to hold for you personally? A. Well, I had to give Harry—I had to meet Harry later and give him one hundred.

Q. But when you met Harry the first time you only gave him $200, is that correct? A. Right.

Q. When were you to give him the other one hundred? A. Later on in the afternoon.

Q. Did you give him the other one hundred? A. Yes.

Q. To get back to Agent Marshall, after you stopped at Howard Avenue, where did you go from there? A. To East 98th Street.

Q. When you got to East 98th Street what did you do? A. I showed him where the stuff was. Told him where to go to get the stuff.

Q. Did you wait while they went to get the stuff? A. Yes.

Q. Did you see that he got it? A. Yes.

Q. From the place which you had indicated? A. Yes.

Q. After he got the stuff, what did you do?

The Court: What kind of a place was it he got it

98 from?

The Witness: Pepsi-Cola box.

The Court: A Pepsi-Cola box?

The Witness: It was inside the wooden Pepsi-Cola Box, there was a shoe box.

The Court: But that Pepsi-Cola box was where?

The Witness: On East 98th Street.

The Court: Was it near a store?

The Witness: Yes.

The Court: What kind of store?

The Witness: Tropical fish.

The Court: Tropical fish?

The Witness: Yes. A pet store.

The Court: What is that?

The Witness: Pet store.

The Court: I don't know what he said.

(Record read.)

By Miss McCann:

Q. Did you wait until Agent Marshall got the stuff out of the box? A. Yes.

Q. Do you recall what happened then after he took the stuff out of the box? In other words, did he come back to you again? A. No. I went away.

99 Q. You went away? A. Yes.

Q. Did you go away immediately or did you wait a few minutes? A. A few moments, and then he got the stuff and he went into a bar.

Q. I am sorry. A. He went into a bar.

Q. Did you wait until he came out of the bar? A. No.

* * * * * * * * * * *

100 Cross Examination

By Mr. La Carrubba:

Q. Mr. Seifert, you say you met Masciale about a month before March 1st, 1954. Now, do you remember the occasion when you met him for the first time? A. No, I don't.

Q. You don't remember? A. No.

Q. You remember where you met him? A. Met him in a restaurant.

Q. Was anybody with you? A. No.

* * * * * * * * * * *

101 Q. Were you introduced by somebody to Masciale —by somebody else? A. Yes.

Q. Who was this person? A. A mutual friend.

Q. Remember his name? A. I had rather not involve it.

The Court: I can't hear.

The Witness: I had rather not answer.

By Mr. La Carrubba:

Q. How many times did you see him between that first meeting and March 1st of 1954? A. I don't recall.

Q. You don't recall ever having met him? A. I say I don't recall how many times.

Q. Did you meet him in that period, in that month, the period of one month? A. I might have.

Q. You may have?. A. I might have, yes.

Q. And during this month and at the first meeting, did you have any discussion about your ability to obtain any narcotics? A. No.

102 Q. Never did. Now, when you met him, Frank Masciale, on March 1st, was that meeting with him by appointment with you? A. No.

Q. It was haphazard, then? A. Yes.

Q. Until you had a talk with him outside the restaurant, is that it? A. Yes.

Q. What did he ask of you? A. He asked me if I knew where to get some stuff.

Q. And what did you tell him? A. Yes.

Q. You said yes, and that is when you walked into the restaurant? A. A few minutes later.

Q. Did he say who you were going to meet? A. No.

Q. Did he say you were going to meet two men? A. Said a couple of friends of his.

Q. Friends of his. He didn't say why you were going into the restaurant to meet them? A. To make a buy. He wanted to buy some stuff.

Q. Now, during the course of this conversation in the restaurant, were any questions asked of you as to what type of stuff you were going to get for these two men? A. Yes.

Q. Who asked you the question? A. Well, they
103 wanted to know what kind of stuff they wanted to get.

Q. Who is they, when you say they? A. The agents.

Q. What was your answer to their question? A. Would you mind repeating that?

Q. What was your answer to their question when you say that they asked you what kind of stuff you were going to get for them? A. Heroin.

Q. Did you tell—did they ask you what purity? A. Yes.

Q. Did you answer them? A. Yes.

Q. What was your answer? A. Told that—they wanted, I think, 60 per cent. I told them it would be very good stuff.

Q. Did you know what that meant when they asked you that they wanted 60 per cent stuff? A. No.

Q. You didn't know? A. No.

Q. What did you mean when you said you would get them good stuff? A. Well, I told them I wouldn't know what the per cent was but it will be good.

Q. You made a telephone call that same evening, is that correct, sir? A. Yes.

104 Q. You say you went to a drugstore to make this call? A. Yes.

Q. Who was with you when you went to the drugstore? A. Agent Marshall and Finlay.

The Court: Agent?

(Answer read.)

By Mr. La Carrubba:

Q. Is that the time you turned the phone over to Agent Marshall? A. Yes.

Q. The person at the other end of the wire was Curtis, is that correct? A. That's right.

Q. Do you know where Curtis was located? A. Pardon?

Q. Do you know where he was when you telephoned him? A. Yes.

Q. Do you remember—is it in Brooklyn? A. Yes.

Q. Was it very far away from the drugstore that you were calling him from? A. Yes.

Q. It was? A. Yes.

Q. Had you purchased—had you made any purchases from Curtis previously? A. No.

Q. And this was the first time you were buying this stuff? A. Yes.

Q. How did you know about Curtis being able to
105 furnish you with narcotics? A. He once mentioned it to me.

Q. Once? Did you have occasion to be friendly with this person? A. Along a buy.

Q. How long a period of time had you known him? A. A few years.

Q. Do you remember when he told you that he could get the stuff for you? A. I can't recall.

Q. You can't remember. Now, do you remember what your agreement was with Curtis as far as reaching this heroin? A. I don't follow your question.

Q. On March 2 you had a further conversation with Mr. Curtis, isn't that correct? A. No.

Q. You didn't? A. No.

Q. Were your arrangements made, then, that evening of March 1st? A. Yes.

Q. And what were your arrangements with Mr. Curtis about the powder? A. I was to meet him the next day.

Q. Meet him? A. Right.

Q. Did you have a place to meet him at? A. Yes.

Q. Where was that place, sir? A. Under the el on 98th street.

106 Q. Did you place the drug in this Pepsi-Cola box? A. No.

Q. Do you know who placed the drug there?

The Court: Did you see anybody else place it there, is the question.

The Witness: No.

By Mr. La Carrubba:

Q. Now, Mr. Seifert, you were awaiting sentence on this matter, is that correct, sir? A. Yes.

Q. Have you had any conversations with Miss McCann prior to today? A. Yes.

Q. Can you tell us about how many times you have met with Miss McCann? A. Once.

Q. Once. Only once, sir? A. Maybe twice.

Q. Maybe twice. Have you discussed the case with her? A. Yes.

Q. And you say that no promise has been made to you? A. That is correct.

Q. If you testified in this matter? A. That is correct.

Q. Is that correct, sir? When you say that, sir, are you saying that no promise was made by Miss McCann?

The Court: I asked him if there had been any promises or representations by any person whomsoever and he

107 said no. You have the right to cross examine.

By Mr. La Carrubba:

Q. Your answer is no? A. Right.

Q. How long is it since you have plead guilty to the crime charged in this indictment? A. I do not remember.

Q. Would you say it is as much as five months ago?

The Court: If you are interested in the fact, we can get it for you.

Mr. La Carrubba: Very well, sir.
The Court: Will you tell us, Mr. Scott?
The Court Clerk: March 17, 1955.

By Mr. La Carrubba:

Q. Mr. Seifert, what is your occupation? A. Truck driver.

Q. What was your occupation in March of 1954? A. I was unemployed.

Q. How did you know this Mr. Curtis? A. I told you I met him a couple of years ago.

Q. Just a couple of years ago, and you have seen him during that period of time? A. Yes.

Q. And during that period of time did you know
108 that he was able to obtain narcotics? A. Yes.

Q. Do you know whether Mr. Curtis is known by any other name? A. No.

Q. Do you know where Mr. Curtis lives? A. No.

* * * * * * * * * * *

114 Redirect Examination

By Miss McCann:

* * * * * * * * * * *

115 Q. On the night of March 1st, when you stopped in the drugstore to make the telephone call, was that after you left Carlucci's restaurant? A. Yes.

Q. How did you get to the drugstore, do you remember? A. In Agent Marshall's car.

Q. Was Mr. Masciale with you in Agent Marshall's car that night? A. No.

Q. Did Mr. Masciale leave you before you went to the drugstore? A. Yes.

* * * * * * * * * * *

128 DAVID W. COSTA, called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

Direct Examination

By Miss McCann:

Q. Mr. Costa, what is your occupation, please? A. Agent for the Treasury Department, Bureau of Narcotics.

Q. Will you describe briefly your duties in connec-
129 tion with that job? A. We enforce the Federal narcotics laws.

Q. Mr. Costa, in the course of your official duties were you assigned to a case involving Mr. Frank Masciale?. A. I was, ma'am.

Q. Do you recall the events which occurred on March 1, 1954? A. I do, ma'am.

Q. Will you tell the jury what those events were, please? A. Well, on the morning of March 1 I met with Agents Marshall and Finlay at 90 Church Street.

Marshall informed me at this time that—

The Court: Please don't tell us any conversation you had.

Q. What was the first thing you did in connection with this case on March 1, 1954? A. I proceeded to Park Ridge Bar at 75th Street and 13th Avenue in Brooklyn.

Q. About what time was that? A. Shortly before 2 p.m., ma'am.

Q. Did you enter the bar? A. Yes. I entered the bar and sat near the entrance to the bar, and about 2 p. m. the phone rang and the bartender answered the phone. He asked if Chappie was in the house.

The Court: Did he ask you?

The Witness: No, sir. He said it out loud for
130 everyone to hear. The defendant, Frank Masciale, was sitting at a table near me, and he got up and had a phone conversation on the telephone.

Q. Do you see the man in court here, who answered the telephone at the bar that day? A. I do, ma'am.

Q. Will you point him out, please? A. He is sitting at the defendant's table, in the gray suit.

The Court: You identify the defendant Frank Masciale?

The Witness: Yes, sir.

The Court: Any question about that?

The Witness: No, sir.

Q. Did you stay in the bar for any period of time after that telephone call?. A. I stayed in the bar approximately five minutes after the phone call and then returned to 90 Church Street.

Q. What was the next thing you did in connection with this case? A. That evening I followed Agents Finlay and Marshall who were riding in a Government vehicle, out to

75th Street and 13th Avenue, where I observed them meet the defendant Frank Masciale.

Q. Were you in a separate vehicle? A. Yes. I
131 was in another Government car following them.

Q. Who was in the car with you? A. Agents Bennet and Mercado.

Q. After Agents Finlay and Marshall arrived at 75th Street—did you say? A. Yes, 75th Street and 13th Avenue.

Q. —what happened? A. The defendant Masciale entered the Government vehicle with Agent Marshall first and drove to Eastern Parkway and Atlantic Avenue.

Q. Did you follow them there? A. I followed them all the way out.

Q. After reaching Atlantic Avenue and Eastern Parkway what did they do? A. They parked the car in front of a restaurant on Eastern Parkway, just off Atlantic Avenue—Carlucci's. Agents Marshall and Finlay got out of the Government car and entered the restaurant. The defendant Masciale also got out of the Government car and proceeded to walk around the block.

Q. Did you follow the defendant Masciale? A. I attempted to follow the defendant Masciale but he was very apprehensive.

Mr. La Carrubba: I object to the characterization.

The Court: Sustained.

Don't characterize. You attempted to follow him
132 but you did not succeed?

The Witness: I did not, sir.

Q. Were you on foot or in a car at the time? A. I was on foot.

Q. What did you do then? A. I then—when I was not able to follow Masciale I got into the Government car and parked on Pacific Street and Eastern Parkway, and I watched the bar where Agents Marshall and Finlay were located.

Q. And did you see the defendant Masciale return? A. Yes, but he returned approximately ten minutes later with Walter Seifert, and they entered the bar. Agent Mercado then got out of the Government car in which he was with me, and he entered the bar. A few minutes later he came out of the bar and got into the Government car again and we sat there and waited.

Q. About how long did you wait? A. Oh, approximately 20 to 25 minutes, ma'am.

Q. What happened then? A. Then the four men, Agents Marshall and Finlay, and Seifert and Masciale, got out of the restaurant and entered the Government car, and drove along Eastern Parkway. They parked several blocks away in front of a drugstore. Agent Marshall and Seifert then left the Government car and entered the drugstore for approximately five minutes.

133 The Court: Who entered the drugstore?

The Witness: Agent Marshall and Seifert.

Q. Now, how long did they stay in the drugstore? A. Approximately five minutes, ma'am.

Q. What happened when they came out? A. When they came out Agent Marshall entered the Government car and Seifert stood on the sidewalk in conversation with the occupants of the car for a few moments, and then Agents Marshall and Finlay and Masciale drove away in the Government car to the vicinity of 75th Street and 13th Avenue, where Masciale left the car.

The Court: Where was that that he left the car?

The Witness: 75th Street and 13th Avenue.

The Court: You say the defendant left the car?

The Witness: Yes, sir.

Q. Mr. Costa, do you recall the events that occurred on the morning of March 2, 1954? A. I do, ma'am.

Q. Will you tell the Court what they were? A. Well, I proceeded out to Atlantic Avenue and Eastern Parkway—

The Court: About what time?

The Witness: At approximately 10 a.m.—and stationed myself in the area. Shortly after I arrived—

134 Q. Excuse me—who was with you? A. Agents Mercado and Bennet.

Q. Were you in a Government car? A. Yes, I was in a Government car.

Shortly after we arrived Agents Marshall and Finlay drove up in another car and parked on Atlantic Avenue. When they arrived defendant Masciale and Seifert were seated in a light blue Chevrolet on Atlantic Avenue. They had a brief conversation—Agents Marshall and Finlay had a brief conversation with Seifert and Masciale in the car and then they left the car and Seifert drove away

alone. I attempted to follow Seifert but I was unable to do so.

Q. Was your attempt to follow Seifert made in a car or on foot? A. In a car. I attempted to follow Seifert in a car but due to the traffic in the area I was unable to follow them.

Q. What did you do then? A. I then returned to Atlantic Avenue and Eastern Parkway to keep Agents Marshall and Finlay under surveillance.

The Court: Do you mean under surveillance or under observation?

The Witness: Well, under observation when they stood there and under surveillance when they moved.

Q. Do you recall what happened after you re-
135 returned? A. Well, they waited on the corner there.

Q. Whom do you mean by "they"? A. Agents Marshall and Finlay, and the defendant Masciale.

Q. Were they in a car or on foot? A. Sometimes they were in a car and sometimes they were on foot, just walking around the corner.

Q. For about how long a period of time was this? A. Well, approximately 11 a.m. I observed a fourth man in conversation with Agents Marshall and Finlay and Masciale.

Q. Did you subsequently learn the name of the fourth man? A. Angelo Occhino.

Q. After the conversation with Angelo Occhino what occurred? A. Agent Marshall, the defendant Masciale, and Occhino entered an Oldsmobile and drove to Howard Avenue and East New York Avenue.

Q. Did you follow them? A. I followed them in a Government car.

Q. When they got there what happened? A. Occhino left the Oldsmobile and entered the Howard Bar and Grill for a few minutes, and then returned and drove Agent Marshall and Masciale back to Atlantic Avenue and Eastern Parkway.

Q. When did they return? A. Agent Marshall and Masciale joined Agent Finlay who waited on the corner.

136 Q. For about how long did they wait? A. It was approximately 1 p. m. when the defendant Masciale

left the area and Agents Marshall and Finlay remained on the corner there.

Q. How long did Agents Marshall and Finlay remain alone? A. They remained alone until shortly before 2 p. m. when Seifert returned in the blue Chevrolet.

Agents Marshall and Finlay then entered the Chevrolet and drove approximately a half a block, at which time Agent Finlay left the Chevrolet and returned to the corner and Agent Marshall and Seifert drove away.

Q. Did you follow them? A. I followed them in the Government car. They drove to Howard Avenue and East New York Avenue and parked on Howard Avenue between East New York Avenue and Sutter Avenue, and Seifert at this time left the car alone and went around the corner. He returned in a few moments and got back into the Chevrolet and drove to East 98th Street between Sutter Avenue and East New York Avenue.

Q. You followed them to that location? Is that correct? A. Yes, ma'am. On East New York Avenue he parked the car and he and Agent Marshall left the car. At this point Agent Marshall walked across the street and picked something up from the sidewalk.

Q. Could you see what he picked up? The shape
137 of the object or whatever it was he picked up? A. He picked up a small package.

Q. Did you see where that package came from? A. No, ma'am. There was a cement wall between my view and the sidewalk at that point.

Q. But you did see him pick up a package? A. I did see him pick up a package, yes, ma'am.

Q. Do you recall the location of the place where he picked up the package? A. It was an exit door for a theatre which is on Sutter Avenue, and there is an aquarium right next to that.

Q. After Agent Marshall picked up the package, what happened? A. He crossed East 98th Street and entered a bar for a few minutes. He came out of the bar and Seifert was standing on the corner of East 98th Street and Sutter Avenue. Agent Marshall nodded toward Seifert and returned to the Chevrolet and drove back to Atlantic Avenue and Eastern Parkway where he rejoined Agent Finlay.

Q. Did Seifert accompany Agent Marshall back? A. No, he did not. Agent Marshall drove back alone.

Q. After Agent Marshall returned what happened? A. Well, he walked back on Eastern Parkway to a grocery store which I believe is owned by Occhino's family, for a minute or so, and then he left the area with Agent
138 Finlay in a Government car, and we followed them.

Q. Where did you go to? A. We pulled in on a side street off Atlantic Avenue and had a brief conference there, and then returned to 90 Church Street.

Q. At the time you pulled off onto the side street did Agent Marshall show you what he had obtained? A. He showed me a brown paper bag and stated that this is the package that he had retrieved from the sidewalk.

Q. I show you Government's Exhibit No. 1 in evidence and ask you whether or not that is the brown paper bag you are referring to. A. Yes, ma'am. I signed the package.

Q. When did you sign the package? A. I signed the package when we returned to 90 Church Street.

Q. Was there any evidence of any tax stamps on that package? A. No, ma'am.

Q. After you returned to 90 Church Street what did you do? A. We initialed the evidence and I believe Agent Marshall retained custody of the evidence at that time.

* * * * * * * * * *

143 Miss McCann: If your Honor please, at this time the Government rests.

The Court: The Government rests.

Motion to Dismiss and Denial Thereof

Mr. La Carrubba: If your Honor please, at this time on behalf of the defendant I would like to move to dismiss on the ground that the Government has failed to make out a prima facie case, in that any connection of this defendant, Masciale, with the procurement of a certain drug admitted into evidence in this proceeding, is so remote and so far-fetched as to exculpate this defendant from any guilt
144 either in the aiding, abetting, sale or procurement of the certain narcotic. And on the further ground that sufficient testimony has been adduced from the mouths of the Government's own witness from which the inescapable inference may be drawn that Mr. Masciale was re-

quested time and time and time again, to the extent of Marshall's own testimony, that he call him, at least ten times, for the purpose of procuring narcotics, while Marshall knew, and his testimony so indicates, that Mr. Masciale was not connected with the traffic of narcotics, so that from the mouth of the Government's witness the possible inference can be drawn that Masciale not being one known to be a trafficker in narcotics, and having been requested by the Government agent, through these innumerable telephone calls that were made by Marshall to Masciale, and since these telephone calls could only have been made for the purpose of entrapping Masciale, then the Government's case must fall at the end of the Government's case, and the Government has failed and is estopped from claiming or accusing or placing the guilt on Masciale's shoulders for the sale that took place between Seifert and Marshall.

The Court: Have you stated your motion?

Mr. La Carrubba: Yes, sir.

The Court: Denied.

* * * * * * * * * * *

145 FRANK MASCIALE, the defendant, called as a witness in his own behalf, having been first duly sworn, testified as follows:

Direct Examination

By Mr. La Carrubba:

Q. What is your full name, sir? A. Frank W. Masciale.

Q. And where do you live? A. 1320 75th Street, Brooklyn.

Q. What is your occupation? A. Truck driver's helper.

Q. And with whom do you live? A. My parents, mother and father.

Q. And other members of your family? A. Two sisters.

Q. How much have you paid me for trying this case, Mr. Masciale? A. Nothing.

Q. Now, you remember a date in January of 1954 when you had a meeting with a man—two gentlemen—one whom you knew as Gene and another man that you knew as Jake? A. Yes, sir.

The Court: Is that Jake?

The Witness: Yes, sir.

146 Q. Do you remember such a meeting? A. Yes, sir.

Q. Do you know who Gene is now? A. Yes, sir.

Q. Who is he? A. A Federal Narcotics Agent.

Q. Gene Marshall? A. Gene Marshall.

Q. Is that this gentleman over here to my right (indicating)? A. That is right, sir.

Mr. La Corrubba: Indicating at the Government's counsel table.

Q. And who was this other man? A. It was someone whom I know.

Q. What was his name? A. Jake Pavelski.

Q. That is the name you knew him under? A. Yes, sir.

The Court: P-a-v-e-l-e-s-k-y.

Q. Do you know where this Jake lived? A. 3467 DeKalb Avenue, Bronx.

Q. And do you know what his family status was or is?

Miss McCann: I object, your Honor.

Mr. La Carrubba: It is a question of identification, if your Honor please.

The Court: I don't know the purpose but I don't like to interfere.

Mr. La Carrubba: It is a question of identification.

The Court: What is his family status? Do you

147 know what that means?

The Witness: No, I don't, your Honor.

Q. Is he married? A. Yes, sir.

Q. Does he have any children? A. Yes, sir.

Q. How many children does he have? A. Two.

Q. Do you know the condition of his wife's health in March or January of 1954?

Miss McCann: I object, if your Honor please. That seems to be immaterial.

The Court: Sustained.

Mr. La Carrubba: I respectfully except, for this reason. There is a quesfion of identification of this particular individual. He has been identified by the Government's witness.

The Court: We have his name and his address, and the condition of his wife's health will not help us on identification.

Q. Can you describe this man that you know or knew as Jake Paveleski? Would you give this jury your description of him? A. Five feet seven and a half inches, possibly eight inches. Approximately 175 pounds.

Q. How old a man would you say he was? A. At this time?

Q. No. In January, 1954. A. Approximately 40
148 years or 42.

The Court: Forty-four?

The Witness: Forty or forty-two, your Honor.

Q. Now, do you remember the date, or, where you met—

The Court: What was his occupation at that time?

The Witness: I don't know, your Honor.

Q. Where did you meet these two men, Gene and Jake? A. At the Park Ridge Bar and Grill.

Q. And is that on 75th Street and 13th Avenue? A. That is right.

Q. Now, when did you meet Jake Paveleski for the first time? A. Approximately—I know it was a week after the Brooklyn Battery opened.

The Court: A week after what?

The Witness: A week after the Brooklyn Battery opened, sir.

Q. Will you identify that as some time around 1949, 1948? A. 1950.

Q. 1950. All right. And did you become acquainted with him? A. Yes, I did, sir.

Q. And how did you get to meet this fellow? A. Well, being employed by a union to enforce a strike at the News Building.

Q. I see. You were employed by a union to en-
149 force a strike? A. That is right.

Q. And you got to meet this fellow Paveleski? A. That is right, sir.

Q. And did you have any conversations with him? A. Yes, sir.

Q. Now, did something happen after this particular assistance that you gave the union in the Daily News strike? A. Yes, sir.

Q. With reference to Jake Paveleski, did you ever have occasion to meet him subsequently? A. Did I meet him?

Q. Yes. A. No, sir.

Q. Paveleski? A. Yes, sir.

Q. Did you have occasion to talk to him? A. Yes, sir.

Q. Now, from this date of 1950, and coming to January of 1954, how many times would you say you either spoke to him or met him, if you did met him? A. 150 times, sir.

Q. Would you say, then, that he called you frequently? A. Yes, sir.

Q. Now, what was the nature of these calls that he made to you? A. He sold me garments, sir.

Q. To sell you garments? A. Yes, sir.

Q. And did you buy any garments from him? A. 150 . No, sir.

Q. Did he offer to sell you anything else?

The Court: I understood you to say that he sold you garments.

Mr. La Carrubba: Offered to sell.

The Court: Is that what you said?

The Witness: No.

Mr. La Carrubba: He offered to sell.

The Court: Oh, he offered garments. Is that it?

Mr. La Carrubba: That is right.

Q. Did he make any other offers? A. Yes, sir.

Q. What? A. Excuse me. Is this the selling, sir? As far as selling?

Q. Yes. To you. A. Yes.

Q. What did he offer to sell you? A. Marijuana.

Q. Did you purchase any from him? A. No, sir.

Q. Did he ever offer you quinine to sell, or a package which he alleged to be quinine? A. Yes, sir.

Q. Now, will you tell the jury what happened on this particular occasion? Can you fix the time first?

The Court: Are you talking about January, 1954?

Mr. La Carrubba: No, sir. Prior to January, 1954.

Q. Can you fix a date about this quinine situation?

151 A. The approximate date?

Q. Yes. A. No, I can't.

Q. Well, would it be in 1953? A. It would be in the latter part of December, 1953, or the early part of January, 1954.

Q. I see. Now, what did he do? A. He offered—

Q. Did he telephone you first? A. Yes, sir.

Q. And where did he telephone you? A. At the Park Ridge Bar.

Q. And did you have a conversation with him? A. Yes, I did.

Q. On this telephone call? A. Yes, I did, sir.

Q. What did he say and what did you say? A. He said he had to see me, it was very important, and he could not discuss it on the telephone.

Q. And what did he do after that?

Miss McCann: If your Honor please, I object to this on the grounds that it seems to be collateral issues.

Mr. La Carrubba: Not at all, sir. Not at all, sir. It is the very foundation of the defense on this charge. I think counsel very well knows it.

The Court: All right.

He said he had to see you. Go on from there.

152 What happened after that?

The Witness: I made an appointment to meet him at 75th Street and 18th Avenue.

Q. And did you meet him? A. No, sir.

Q. Did you meet him subsequently? A. A half hour later, sir.

Q. I see. And what happened then? A. He wanted to know the reason why I wasn't on 75th Street and 18th Avenue.

The Court: I didn't get that answer. He wanted—

The Witness: He wanted to know the reason why I wasn't on 75th Street and 18th Avenue.

Q. And did you give him the reason why you weren't there? A. I told him I could not be bothered with him.

Q. Did you have any other conversation? A. Yes, I did, sir.

Q. What was the nature of that conversation? A. That he had quinine in order to sell. Our conversation was about quinine, sir.

Q. And what did you say about the quinine? A. I said I don't know where to sell it.

The Court: May I hear that answer?

(The last answer was read by the reporter as follows: "A. I said I don't know where to sell it.")

Q. Did he give you a package at that time? A.
153 Knowingly, no.

Q. I beg your pardon. A. Knowingly, no.

Q. Knowingly, no? What happened? A. Well, during the course of the conversation he put something in my pocket which led me to believe it was money because during the time of our conversation I told him that I was in need of money myself.

Q. And did you look in your pocket to see what was placed there? A. That is right, yes, I did, sir.

Q. And what did you find? A. It wasn't a bag, sir, but it was part of a bag.

Q. And did you look inside the part of this bag? A. Yes, I did, sir.

Q. And what was in there? A. Powder.

Q. What did you do with this powder? A. I didn't do anything with it.

Q. You mean you kept it in your pocket all this time? A. No. I took it out of my pocket. That is when I looked at it, sir.

Q. I see, and what did you do with the powder at that time, when you took it out of your pocket? A. Well, there was a discussion about that. Then I handed it back to him, sir.

Q. You handed it back to him? A. That is right, sir.

Q. Did he proffer it to you again? Did he offer it
154 to you again? A. Yes, sir.

Q. And did you accept it? A. Immediately, no.

Q. I see. Did a time come, and I am still talking about this same meeting with him, when you did accept it? A. I did not get that question, sir.

Q. You say that you did not accept the powder? A. Yes, I did.

Q. Now, what did you do with the powder after you accepted it? A. I then proceeded to 69th Street and 14th Avenue, sir.

Q. Where did you go? A. In a candy store.

Q. And what did you do? A. I bought a package of Lucky Strike cigarettes.

Q. What did you do with the powder? A. I kept it in my pocket.

Q. What did you do with the powder, if anything? A.

Oh, after I left the candy store I proceeded to Jay's Tavern located on 15th Avenue and 67th Street.

Q. Was Jake Paveleski with you? A. Yes, sir.

Q. All this time? A. Yes, sir.

Q. All right. Now, when you went into the tavern what did you do with reference to the powder? A. I spoke to the bartender, sir.

Q. Was Jake Paveleski with you? A. No, sir.

Q. Where was he? A. Right outside the bar and
155 grill.

Q. And after you spoke to the bartender what did you do? A. I then proceeded to the bathroom and took the contents from my pocket and threw them in the toilet bowl, sir.

Q. Now, did you meet with Paveleski after you left the bar? A. Yes, sir.

Q. Did you have any conversation with him after you left the bar? A. Yes, I did, sir.

Q. What was this conversation about? A. I said I would let him know if the individual I had to see in this here bar, Jay's Bar and Grill—I told him this party I had to see, this individual I had to see in Jay's Bar, wasn't around and I left word there, if he should come around, to wait there, and I would then come back and talk to him about the quinine, which he had told me it was quinine—talk to him about if he would want to buy it—I would talk to him if he would want to buy it.

Q. You talked to the bartender? Right? A. That is right.

Q. What did you say to the bartender? A. I asked him for a party, an individual's name whom I know wasn't in the bar.

Q. Did Pavelski leave you then? A. No, sir.

Q. He stayed with you? A. That is right.

156 Q. Now, did he leave you that day at any time or did you go somewheres with him? A. Yes, we did, sir.

Miss McCann: If your Honor please, this whole line of direct seems to be not related to the issue in this case. I renew my objection on that ground.

Mr. La Carruba: I respectfully submit, your Honor—

The Court: I don't like to cut off the defendant's story.

Mr. La Carrubba: Thank you, your Honor.

Q. Now, did you go anywhere else with Paveleski that day? A. Yes, sir.

Q. Where did you go? A. A clubroom located between 73rd and 74th Street on 13th Avenue, sir.

Q. And what did you do there? A. Went inside, sir.

Q. What did you do inside the clubroom? A. We were talking, sir.

Q. What were you talking about? A. About the quinine.

Q. Now, what did he say about the quinine? A. He was telling me when I should go back to the bar to make sure I understand what the price would be.

Q. Did he give you a price? A. Yes, sir.

Q. What was the price? A. Well, he gave me several prices. They varied, sir.

157

The Court: What prices did he give you?

The Witness: Five cents per ounce. Ten cents per ounce. Eight cents per ounce. Twelve cents per ounce.

Q. Did he tell you how much he could obtain for you? A. Seven hundred ounces.

Q. Did he ever obtain such a quantity of quinine for you? A. To my knowledge, no, sir.

Q. In other words, you never had any 700 ounces of quinine from him? A. Never seen it, sir.

Q. Was there anything else discussed at this clubroom? A. Yes, sir.

Q. What? A. Narcotics, sir.

Q. What was the nature of the discussion with reference to narcotics? A. His exact words was, sir, "Get hep to yourself. You can make a lot of money."

Q. And this you place around December of 1953? Is that correct, sir? A. I can't recall whether it was the latter part of December or the early part of January, sir.

The Court: This is January, 1954?

Mr. La Carrubba: 1954, that is correct, sir. Either the latter part of December or the early part of January.

158

The Court: Will you wait just a minute, sir?

Mr. La Carrubba: Yes, sir.

The Court: "Get hep to yourself. You can make a lot of money," I think is the last testimony.

Mr. La Carrubba: That is correct, sir.

Q. Now, was there anything else discussed at this meeting at the clubroom? A. Yes, sir.

Q. What? A. Mostly about narcotics, sir.

Q. Well, what did he say about narcotics? Did he say anything about the quality? A. No, sir.

Q. Did he say anything about the quantity? A. No, sir.

Q. What was said about this narcotics? A. That if I was interested, to weigh my thoughts, and the next day when he would come around I would have to give him my thoughts, what I was thinking about the preceding night about discussing about narcotics, and also what was said between me and this individual whom I was supposed to meet at Jay's Tavern on the discussion of that there sale.

Q. Now, what did you say about the thoughts that
159 you had with reference to the narcotics and this quinine? A. I didn't want no part of that, sir.

Q. You told him that? A. That is right, sir.

Q. Did you make any bones about whether or not you wanted to deal with him about narcotics or quinine? A. Well, I did not exactly throw him out, sir, out of the clubroom.

Q. But you told him— A. That is right, sir.

Q. —that you weren't interested? A. That is right, sir.

Q. Did you not, sir? A. That is right, sir.

Q. Was anything further then discussed at this meeting? A. Yes, sir.

Q. What? A. If I ever went to New Gardens dance hall located on 14th Street between Third and Fourth Avenues in New York City.

Q. He asked you whether you went there? A. If I have gone there.

Q. And what was your answer? A. I said yes, sir.

Q. What did he say about that? A. He says, "What are you doing up there"?

Q. What did you say? A. I haven't done anything.

Q. Now, did he say anything further with
160 reference to this this? A. Yes, sir.

Q. What? A. He asked me if this here girl, Terry Winters, who at that time lived at the Crescent Hotel asked for him at the time I went to the dance hall to see a girl,

Barbara Thomas, who lives at the Elwood Hotel, located on 49th Street, I think, sir, in New York City.

Miss McCann: If your Honor please, I couldn't understand what the witness said.

The Court: Will the reporter read that, please?

(Last answer read by the reporter.)

Q. What else was said at this time? A. If they ever asked for him.

Q. If they ever asked for him? A. That is right.

Q. And what did you say? A. I says, no, sir.

Q. And was anything else said about that? A. The girls and I had a discussion, sir, if that is what you mean.

Q. No. I mean at this meeting with Jake Paveleski at the clubroom between 73rd and 74th Streets on 13th Avenue, was anything else discussed between you and Jake Paveleski with reference to what you just said about these girls? A. No, sir.

Q. Did he say anything to you? A. I want to retract that last—

161 Q. All right, go ahead. A. Yes, sir, he did, sir.

Q. What did he say? A. Like I said, if I had any conversation with these here two girls at this here dance hall.

Q. About what? A. If I have talked to these girls at this dance hall.

Q. All right. Did you say yes? A. Yes, I did, sir.

Q. Did he ask you if your conversation involved anything about marijuana. A. Yes, sir.

Q. What was your answer to that question? A. I says I don't see him any more. I told them, you know, I told the two girls, about that.

Q. Did he say anything to you about running marijuana? A. Yes, sir.

Q. What was your answer to that? A. I don't want no part of it, sir.

Q. Was anything else discussed? A. Yes, sir.

Q. What? A. Is this the conversation between the girls and I still, sir?

Q. No. I am talking about the conversation between you and Jake Paveleski at the clubroom. Now, he has discussed quinine; he has discussed narcotics with you; he

has also discussed marijuana, you say? A. Yes, sir.

162 Q. Did he talk about anything else? A. Yes, sir.

Q. What? A. Pertaining to the two girls, sir. It was at least an hour. Our conversation was about them.

Q. All right. Now, pertaining to these two girls, what was your conversation about? A. Well, since I seen the girls, we said hello to each other, and they knew me to be Jake's friend, since he introduced me to this here place, they thought I dealt in marijuana.

Q. Now, did you ever deal in marijuana? A. No, sir, I did not.

Q. Have you ever dealt in narcotics? A. No, sir.

Q. Have you ever dealt in quinine? A. No, sir.

Q. Have you ever been a user of narcotics? A. I will take my clothes off right now to prove that, sir.

Q. Did he, did Jake, in this conversation, further discuss the question of your taking marijuana up to this dance hall? Is that what this is? A. That is right, sir.

Q. Did he discuss that any further with you? A. Yes, sir, he did.

Q. What was your answer? A. He says, "If you listened to me in the first place," he says, "you would have made some money."

163 Q. "In the first place" meaning what? A. Meaning that the first time he took me up to the dance hall and introduced me to the two girls, I then seen him leave a package with this other girl.

Q. You saw him leave a package with a girl? A. That is right, sitting at the table.

Q. Did he tell you what was in this package? A. At that time he did not say, sir.

Q. Subsequently did he tell you what was in that package? A. Say about a half hour, maybe an hour later, sir.

Q. Did you indicate to him at that time—

The Court: "What did you say to him" you mean?

Mr. La Carrubba: I am sorry.

Q. What did you say to him with reference to this conversation with reference to these two girls and marijuana? A. I told him he was very foolish and crazy.

Q. Did you say to him that you would have no part of it? A. That is right, sir.

Q. Was anything further discussed then? A. Yes, sir.
Q. What? A. He said he would call me up the next day.
Q. Did he leave then? A. Yes, sir.
Q. Did he call you the next day? A. Yes, sir.
Q. Where did he call you? A. At the Park Ridge Bar and Grill, sir.

Q. And did you have a conversation with him on
164 the telephone? A. Yes, sir.

Q. And what was that conversation about?

The Court: Are you anywhere near fixing a time?

Mr. La Carrubba: Well, he has fixed it.

Q. Let me ask you this. You met Marshall and Paveleski at the Park Ridge Tavern in January of 1954. Is that correct? A. That is right, sir.

Q. Would you remember the day in January of 1954 that you met them? A. Well, I know we ordered something to eat and the job was off on Monday, so I know it was Monday for sure. It was over a week end, say Saturday or Monday.

Q. Can you fix whether it was the first Monday or the second Monday of the month? A. Unless—I can't answer that, sir. I don't know.

Q. How much prior, how many days prior to this meeting in January that you just referred to, did you meet Paveleski at the clubhouse on 13th Avenue? A. I don't understand that question, sir.

Q. You met Gene Marshall and Jake Paveleski at the Park Ridge in January of 1954? A. That is right, sir.

Q. How many days, weeks, or months before this meeting did you meet Jake Paveleski alone at the 18th
165 Avenue place and then went to the clubhouse? A. That is right, sir.

Q. I say how many days, weeks or months? A. I still don't understand what you mean, sir.

The Court: How long before the meeting at the Park Ridge was the meeting at the clubhouse?

The Witness: The meeting with Marshall, sir?

I would say approximately a week, sir.

Q. So now if I tell you that the date of your meeting with Marshall and Paveleski or a man by the name of Kowel was on January 14th, then your meeting with Paveleski or

Kowel was a week before or on or about January 7th. Is that right? A. That is right.

The Court: Do you realize that you have introduced a name which is not according to the witness's testimony?

Mr. La Carrubba: I beg your pardon. I am sorry. Yes, sir. I understand that and I move—.

The Court: The only proof we have heard was of a person by the name of Paveleski.

Mr. La Carrubba: Very well, sir. I stand corrected. Thank you.

Q. Now, would you fix January 7th as the date on which you met Paveleski and went to the clubroom? A.
166 A definite date, no, sir.

The Court: You said it was about a week before, didn't you?

The Witness: Somewhere around that.

The Court: Can't you go on from there?

Mr. La Carrubba: Yes, sir. Thank you.

Q. The following day Paveleski called you at the Park Ridge Tavern? A. That is right, sir.

Q. And you had a conversation? A. Yes, sir.

Q. What was the nature of that conversation? A. If I seen the individual I met the night before, whom I was supposed to see the night before, and disclosed my talk to him. If I did meet him, sir.

Q. And what was your answer to that question? A. I told him the party was not interested.

Q. Had you met anyone and discussed the question of selling quinine? A. No, sir.

Q. Was anything further said during the course of that conversation? A. He wanted to see me, sir.

Q. Did you make an appointment? A. I did not make an appointment, sir.

Q. Was an appointment suggested by Paveleski? A. Yes, sir.

Q. When and where was this appointment sug-
167 gested? A. On 72nd Street and 13th Avenue, sir.

Q. Did you agree to meet him there? A. Yes, sir.

Q. At what time and what date? A. Somewhere around January 7, sir, and about 7 o'clock in the evening.

The Court: What was that place, please, the appointment you made?

The Witness: 72nd Street and 13th Avenue.
The Court: On the street or elsewhere?
The Witness: On the street, sir.
The Court: What time of day?
The Witness: Approximately 7 o'clock.
The Court: Morning or evening?
The Witness: Evening, sir.
Q. And what day? A. I can't recall what day, sir.
Q. Was it—
The Court: Did you meet him?
The Witness: Yes, I did, sir.
The Court: Go ahead.
Q. When did you meet him? What day did you meet him? How many days after this telephone conversation? A. He came, yes, several times, after that conversation.
Q. All right. Let's go to the first time he came around. When did he come around for the first time? A. In 1951, sir.
168 Q. Oh, no. I am referring now to a telephone conversation that you had with him the day after you met him at the clubhouse. Right, sir? A. That is right, sir.
Q. All right. He called you at the Park Ridge and you had a conversation? A. Yes, sir.
Q. He suggested a meeting place to you? A. Yes.
Q. Right? A. Yes
Q. And you say it was at 72nd Street and 13th Avenue at 7 p.m.? A. That is right, sir.
Q. All right. Did you meet him at the designated time? A. I met him on a Monday, sir.
The Court: Did you keep that appointment with him?
The Witness: Yes, sir.
The Court: All right. Please proceed.
Q. How many days after this telephone conversation did you meet him? A. One day.
Q. The following day? A. Yes, sir.
Q. Now, we are at January 9. Did you have a conversation with him? A. Yes, sir.
Q. What was the nature of the conversation? A. About narcotics, sir.

Q. What did he say and what did you say? A.
169 He says, "Have you weighed your thoughts of our conversation the previous night?"

Q. And what was your answer to that? A. I said "I don't have to think about it." I says, "I told you last night my answer."

Q. Meaning what, sir? A. I did not want to bother with it, sir.

Q. Was anything else discussed at that time? A. Yes, sir.

Q. What? A. The quinine, sir.

Q. What did he say and what did you say? A. He wanted to know if I seen this person who I was supposed to have met and our discussion between this individual and I.

Q. And what did you say to that question? What was your answer to that question? A. I says the man wasn't interested, sir.

Q. Was anything else discussed at that time? A. Yes, sir.

Q. What? A. If someone would be interested in how to bring narcotics into the country, sir.

Q. He asked you? A. Yes, sir.

Q. What was your answer to that question? A. I told him I don't know anyone, sir.

The Court: "I told him"—

170 The Witness: I told him I don't know anyone, sir.

Q. You mean you don't know anyone who imports narcotics? A. That is right, sir.

Q. Is that your answer? A. That is right, sir.

Q. Was there anything else said at that time? A. Anything else? A. No, sir.

Q. Did he leave you? A. Yes, sir.

Q. Did you go somewhere else and did he go some place else? A. That is right, sir.

Q. When was the next time that you either heard from him or saw him? A. The very next day, sir.

Q. Where and when? Meaning what time? A. The time I would say 8 o'clock on 72nd Street and 13th Avenue, sir.

Q. Did you have an appointment with him? A. Yes, sir.

Q. Did you make it the previous evening? A. Yes, sir. I did not make no appointment with him, sir.

Q. How did you come to meet him at 8 o'clock, and I assume it was in the evening, on 72nd Street and 13th Avenue? A. He made an appointment with me, sir.

Q. How? Was it the day previously, or did he call you on the telephone to make the appointment? A. He did call then and it was the very next day, sir.

Q. He called at what time? A. Lunch time.

171 Q. And where? A. At the Park Ridge Bar and Grill, sir.

Q. Did you have a conversation? A. Yes, sir.

Q. On the telephone? A. Yes, sir.

Q. What did he say and what did you say? A. He said he has got something big, he wanted to talk to me. It was very important, and for me not to make, you know, say I would agree, I would meet him and not show up, sir.

Q. And what did you say to that? A. I told him "All right," sir.

Q. And did he or you suggest a meeting place? A. He suggested a meeting place, sir.

Q. Was that at 72nd Street and 13th Avenue? A. That is right, sir.

Q. In the street? A. That is right, sir.

Q. At eight p.m.? A. Eight p.m.

Q. Did you meet with him? A. I did, sir.

Q. Did you have a conversation with him? A. Yes, sir.

Q. What was the nature of the conversation? A. Narcotics.

Q. What did he say and what did you say? A. He says this is my chance to make a lot of money and that I shouldn't flunk out like—in other words, I should give him a chance for him to speak, and listen to what he had

172 to say this time.

Q. Did you listen to what he had to say? A. Yes, sir, I did, sir.

Q. What did he say? A. He told me he knew some buyer who was in the market to buy narcotics, sir.

Q. Did he give you his name? A. No, sir.

Q. What did you say? A. He did most of the talking, sir. I don't imagine I said much that night.

Q. All right, what did he say further? Did he say anything further about this person? A. He said he had a lot of money, sir.

Q. That this person had a lot of money? A. This buyer, sir. That is right, sir.

Q. Did he say anything to you about your putting up a front? A. That is right.

Q. What? A. To say I was a big narcotics handler and I was influenced with a lot of people.

Q. Did you agree to say that? A. No, sir.

Q. What did you say? A. I told him since I wasn't, how could I possibly say I was?

Q. And what did he say, to that? A. He said he would brief me on what to say.

Q. And did he brief you? A. Yes, he did, sir.

Q. How did he brief you, or what did he tell you?

173 A. He was telling me the methods that these narcotics pushers or anyone who deals with traffic in narcotics—how they talk in reference to the slang words, you know, that they would use, sir.

Q. Did he say anything else? A. Yes, sir.

Q. What? A. That the money that I would make would come very handy for me.

Q. What did you say to that? A. I told him I knew it would but that is too low for me.

Q. Was anything else said at this time? A. Yes, sir.

Q. What? A. I said I will go along with him in meeting this market he wanted me to see, sir.

Q. Did he say anything to you about his getting any money merely by meeting you? A. No, sir.

Q. Did he say anything about money other than the question or the fact that he said you could make a lot of money out of narcotics? A. He said, "Stick with me. You will make a lot of money," sir.

Q. Did you make, or did he make an appointment with you at that time for some future time? A. He said he would call me up, sir.

Q. Did you separate at that time, after this fur-

174 ther discussion about the fact that he would telephone you? A. Yes, we did, sir.

Q. Then nothing further was said at this subsequent meeting? A. No, sir.

Q. Did he telephone you again? Yes, he did, sir.

Q. Where and when? A. Park Ridge Bar and Grill, sir.

Q. When? A. I am not sure if it was the next day or the following day, sir.

Q. Taking us approximately to January 10 or 11? A. That is right, sir.

Q. Did you have a conversation with him on the telephone? A. Yes, I did, sir.

Q. What did he say and what did you say? A. He said he would like to see me, sir.

Q. Anything else? A. As to my thoughts, what was said that there night, what I thought about what he said.

Q. And did you say your thoughts? A. I did, sir.

Q. And what were they? A. I told him he was still crazy.

Q. Did he ask to meet with you?

I am sorry. I believe you said that he did ask to meet with you. Did he arrange for an appointment? A. He called back two hours later, sir.

Q. On this same day? A. The very same day, sir.

Q. And did you have a further conversation with
175 him? A. Yes, sir.

Q. And what was the nature of the conversation? What did he say and what did you say? A. He said, "I would just like you to meet this here, this buyer," whom he had been talking about either the day—or the day previous—at the time I received that telephone call, sir.

Q. What did you say to his request? A. I told him I didn't want to, sir.

Q. Was anything further said on this subsequent conversation of January 10 or 11? A. He told me he would want to see me this last time because he wanted to tell me how sick his folks were and he had to see me.

Q. And what did you say to that? A. I said yes, I will see him.

Q. Did he make any reference to his wife when you say "folks"? A. Yes, sir.

Q. Did he say something to you with reference to his wife's illness? A. Yes, sir.

Q. What was that statement that he made to you? A. He mentioned that she had tuberculosis or a touch of tuberculosis. I don't know if she was negative or positive sir.

Q. Did he say anything about anybody else in his
176 family?

Miss McCann: If your Honor please, I—

A. His father was ill, sir, I think. I think he might have said that. I am not sure, sir.

Q. Was anything else said in this conversation? A. All I know is he was supposed to bring someone down, sir.

Q. Did you make an appointment with him? A. No, sir.

Q. Did he telephone you after this date of either January 10 or 11? A. I am almost sure he called one more time before our meeting.

Q. Do you know how much time elapsed between this conversation and the two conversations on January 10 or 11 and the subsequent telephone call? A. I could not say, sir. Maybe two or three days. Maybe.

Q. You did receive a telephone call at the Park Ridge? A. That is right.

Q. And you had a conversation with this Jake? A. That is right, sir.

Q. And what was the nature of the conversation that you had with him? A. The same thing he was always talking about, sir, narcotics.

Q. And what was your answer to his request?

The Court: He didn't say anything about a re-
177 quest.

Mr. La Carrubba: I am sorry.

Q. What was your statement?

The Court: What did you say?

The Witness: I said if he was going to talk about narcotics I won't talk to him, but if he was going to talk about his wife's illness I would see him.

Q. Was anything else said at this conversation? A. No, sir.

Q. At this telephone call? A. No, sir, just our meeting each other, sir.

Q. And did you arrange a meeting? A. I did not arrange no meeting.

Q. Did he arrange a meeting? A. Yes, he did, sir.

Q. For when and at what place? A. The Park Ridge Bar and Grill, sir, 75th Street and 13th Avenue.

Q. And when was it to be? A. Noontime, sir.

Q. What date? A. I would say around the 14th of January, sir.

Q. Did he say that anybody else was going to be present? A. Yes, sir.

Q. Did you agree to meet with him? A. Yes, sir.

Q. Did you meet him? A. Yes, sir.

Q. And who besides Jake Paveleski was present at this meeting? A. Gene.

178 Q. Meaning Gene Marshall, the gentleman to my immediate left here (indicating)? A. That is right, sir.

Q. And was there anyone else present at this meeting? A. No, sir.

Q. Did you have a conversation with Jake Paveleski and Gene Marshall at this Park Ridge Tavern? A. Yes, sir.

Q. Do you remember what that conversation was about? A. Yes, sir.

Q. Do you remember what you said and do you remember what—

The Court: What was the subject of the conversation?

The Witness: I spoke to Jake first, sir, before Gene—Gene was at the bar.

Q. Gene was at the bar? A. Yes.

Q. And you were where? A. I was at a table nearby, sir.

Q. With Jake? A. That is right, sir.

Q. Did you have a conversation with Jake at that time? A. That is right, sir.

Q. What was the subject of the conversation? A. He says, "The show will be on in a few minutes. Don't
179 forget. You have got to impress him."

Q. Did he add anything else? Did he say anything else? A. He says, "Don't laugh now." That was all, sir.

Q. And what did you say, sir? A. I said O.K., sir.

Q. Did Gene then join you at the table? A. I don't know that, sir.

Q. What happened after that conversation with Jake Paveleski? A. Well, I don't know if Jake walked me over to the bar or he walked over to the bar by himself and then talked to Gene and then came to the table where I may have been sitting.

Q. And did you have a conversation with Paveleski and Marshall at the table? A. Yes, sir.

Q. And what was the subject matter of the conversation at that time? A. I didn't speak of narcotics, sir.

Q. What was the subject that was broached at the table? A. I think after he introduced me to Gene I was silent for a few moments and then he says, "Go ahead. It is all right." So I told you that before I came down. That is why I took him down. So I started to laugh because it seems that when he talks he always stutters.

Q. You mean Jake Paveleski? A. That is right.

180 That is why he mentioned for me not to laugh when the show was on, before Jake came over.

Q. All right, what happened after you started to laugh? A. Well, I put my hands up near my mouth, not to make Gene think I am laughing at Jake. I just sort of glanced at the bar, like I was looking at someone.

Q. Did somebody say something after that? A. Yes, sir.

Q. Who said it and what did he say? A. He says, "Come on, let's get on with this." Jake—Jake Paveleski.

Q. He said what? A. "Come on, let's get on with it."

Q. And what did you say, if anything? A. "What shall we talk about?"

Q. And what was said after that? A. I think Gene brought up the topic, sir. I am not too sure of that.

Q. What topic? A. The topic of narcotics.

Q. What was said about the narcotics? A. If to my knowledge I could obtain it or help him obtain narcotics, sir.

Q. What did you say?

The Court: Who said that?

The Witness: Well, it was either Gene or Jake, sir.

Q. What did you say to that? A. I says, "Right now I can't," sir.

181 Q. Was anything else said? A. Everyone was pretty friendly there. I don't think there was too much talking about narcotics after we first started talking.

Q. You indicated, though, that you did not think that you could obtain any at that time. Is that right? A. That is right.

The Court: His precise language was "Right now I can't". That is his testimony.

Q. Did you at that time have anyone that you knew who could supply you with narcotics? A. No, sir.

Q. Was anything further discussed at this meeting? A. Telephone numbers, sir.

Q. Telephone numbers? A. That is right.

Q. Were you asked to give a telephone number? A. That is right, sir.

Q. Did you give him a telephone number? A. No, sir.

Q. Was a telephone number offered to you? A. That I can't recall, sir.

Q. Well, you said you talked about telephone numbers. A. I don't know if he offered or if I asked him for a telephone number—his telephone number.

Q. Did you get a telephone number? A. Yes, I did, sir.

Q. Do you remember the number? A. I don't know the number but I know the hotel and possibly the room number.

182

Q. And what was that hotel? A. Henry Hudson Hotel, sir.

Q. Do you happen to remember the room number? A. I am not sure. I think it is 1703.

Q. Now, did you give either Jake or Gene Marshall any number that you could be gotten at? A. No, sir.

Q. Do you know the number; the telephone number, at the Park Ridge? A. Yes, sir.

Q. Would you say what that number is? A. Beach View 2-9373.

Q. Beach View 2-9373? A. That is right, sir.

Q. Did you give Marshall a telephone number of some other place? A. To my recollection, no, sir.

Q. Was anything further discussed at this time? A. No, sir.

Q. Did you leave or did they leave? A. We all walked outside, sir, from the bar and grill.

Q. And where did you go? Did you separate? A. Yes, sir.

Q. Did you have any further conversation with either Paveleski or Marshall after this date of January 14th? A. I don't understand what you mean. Would you mind repeating the question?

183

Q. When was the next time you spoke to either Paveleski or Marshall? A. The next day, sir.

Q. How did that come about? A. Gene came around the next day, sir.

Q. And did you have an appointment to meet him? A. I don't believe so.

Q. Where did you meet him? A. At the Park Ridge Bar and Grill, sir.

Q. Did you have a conversation? A. Yes, sir.

Q. What was the subject matter of that conversation? A. He said he wanted to speak to me alone, sir, and without Jake, sir.

Q. Was Jake with him? A. No, sir.

Q. Did you speak with Marshall alone? A. Yes, sir.

Q. What was the subject matter of the conversation? A. Narcotics, sir.

Q. What did he say and what did you say? A. He said something about, "Are you going to get the ball rolling?" Something along them lines. Maybe not the exact words.

Q. And what did you say? A. I says I am trying.

Q. Were you in fact trying? A. No, sir.

Q. Was there anything else discussed? A. Yes, sir.

Q. What? A. It had something to do with Jake.

184 Q. Do you remember? A. Something to do—like how I knew about narcotics or how Jake knew me, something like that, how come Jake and I knew each other, how we met.

Q. Did you tell him? A. I believe so.

Q. Was anything further discussed? A. No, sir.

Q. Was an appointment made for a future time? A. No, sir.

Q. When was the next time you spoke to either Marshall or Payeleski? A. There was Jake I spoke to next, sir.

Q. How? A. On the telephone.

Q. Where did he call you? A. At the Park Ridge Bar and Grill.

Q. Was that the following day? A. It may have been, sir, I am not sure of that.

Q. What was the subject matter of that conversation? A. How I am, how is everything going, what is materializing between Gene and I, and if anything should materialize not to forget him.

Q. What was your answer to that statement? Did you say anything to that? A. I says if anything should occur he will probably know, he will probably be the first one to know about it.

185 Q. Did Jake Paveleski say to you at this time that he was getting some money from this Marshall? A. Just to impress him, sir.

Q. Just to impress him? A. Yes, sir.

Q. Did he say he was getting any money from him? A. I don't know.

Q. You don't know? A. No.

Q. You don't remember? A. I don't remember, sir.

Q. All right. When was the next time that you spoke to either Paveleski or Marshall? A. It was Gene. The next time I spoke was to Gene, sir.

Q. How did you speak to him? A. On the telephone, sir.

Q. Did he telephone you? A. That is right, sir.

Q. Where? A. At the Park Ridge Bar and Grill, sir.

Q. Did you have a conversation with him on the telephone? A. Yes, sir.

Q. What was the subject matter of that conversation? A. If I found anyone that deals with narcotics.

Q. What was your answer to that? A. I says, "As of now no one," sir.

Q. I beg your pardon. A. I says as of that moment, speaking to him on the telephone, I says, "No, sir, I have no one."

186 Q. Was anything else discussed? A. He says something about trying to get in touch with me, sir, and I don't know, he says something about the Park Ridge number, something to do with the Park Ridge; I don't know what was said else.

Q. Was anything further discussed? A. It was try and hurry it along if I can find anyone because he comes in and out of Washington or Texas, comes to New York to pick up what he has to pick up. I imagine it would be narcotics because he was talking always about narcotics, and he says he goes to Texas or Washington. I don't know. I know them two states was always mentioned. I don't know if it was Washington, D. C.—the state or the capital.

Q. Was there anything else discussed? A. No, sir.

Q. When was the next time that you spoke to either Paveleski or Marshall? A. I don't know. I don't know, sir. I don't know the day, if it was the following day.

Q. Was an appointment made for March the 1st at the Park Ridge Tavern? A. That is right, sir.

Q. Do you remember how that came about? A. Through a conversation between Gene and I.

Q. Was it a telephone call? A. I would say yes, sir.

Q. Had you met Marshall in person previously? A. Yes, sir.

187 Q. Was there anyone else with him? A. No, sir.

Q. You met him alone? A. That is right, sir.

Q. Where did you meet him? A. I met him on First Street and First Avenue, New York City, sir.

Q. And how was that appointment arranged? A. Oh, we just met there, sir.

Q. Did you meet him—

The Court: Are you telling us that you had no appointment to meet him, or that you did meet him?

The Witness: I did have an appointment—not that I had an appointment with him—he had with me, sir.

The Court: Well, you met?

The Witness: That is right.

The Court: You had an appointment?

The Witness: That is right.

The Court: At what time of day?

The Witness: Nine o'clock.

The Court: Morning or afternoon?

The Witness: Evening, sir.

The Court: When? How long before March 1 was this?

The Witness: Oh, I would say about February 12 or 15. Somewhere around that time.

Mr. La Carrubba: Your Honor, appreciating that we are close to the noon recess, but by the same token,

188 understanding that this witness has been on the stand for a long period of time, well over an hour and some minutes, may we have a five minute recess?

The Court: Five minute recess.

Mr. La Carrubba: If not for the witness, for me.

The Court: Five minute recess.

Mr. La Carrubba: Thank you, your Honor.

The Court: That does not mean that you are going to confer with your client.

Mr. La Carrubba: I beg your pardon.

The Court: That does not mean that you are going to confer with your client.

Mr. La Carrubba: No, sir. I am going to have a cigarette. Unfortunately I am addicted to the weed.

The Court: Would the members of the jury like to leave the box for this recess?

(The jury was excused for a five-minute recess.)

(Five-minute recess.)

Frank Masciale, resumed:

Direct Examination (continued):

The Court: We were last dealing with an appointment made at First Avenue and First Street, February 12 or 15, at 9 o'clock in the evening, the appointment
189 being between this witness and Mr. Marshall. Go ahead.

By Mr. La Carrubba:

Q. Did you have a conversation with Marshall at that time? A. Yes, I did, sir.

Q. What was the subject of this conversation? A. Narcotics, sir.

Q. What did he say and what did you say? A. He wanted to give me, I think it was, I think he wanted to give me $200 or $400, sir.

Q. At that time? A. That is right, sir.

The Court: Is that what he said?

The Witness: That is what he said, sir.

Q. What did you say? A. I said "All right," sir.

Q. Did he give you this money? A. No, sir.

Q. Was anything else said? A. Yes, sir.

Q. What? A. That he wanted the narcotics before he gave me the money, sir. "Cash and carry" he called it.

Q. Did you say anything to that? A. I says "I have got to have the money first," sir.

Q. Did he give it to you? A. Yes, sir.

Q. He did? A. Yes, sir.

Q. How much did he give you? A. I am not sure if it was $200 or $400, sir.

190 Q. Did you give him any narcotics? A. No, sir.

Q. Did you give him anything? A. Yes, sir.

Q. What? A. Money.

Q. You gave him money? A. I gave him back his money he gave me.

Q. Was anything else discussed? A. Yes, sir.

Q. What? A. Well, at the time he first gave me the money he wanted to make sure that I would come back either with the narcotics or this money, so we walked to this store located on First Street and First Avenue, right on the corner—it is a big luncheonette—and I told him, well, if he feels that way I would give him my home phone number, to call and ask for me, and probably my mother or sister would answer that I am not home, and he would know that that is my home, because that is my home.

Q. Did you give him the number at your home? A. Yes, sir.

The Court: In whose name was the phone listed?

The Witness: Mrs. Anna Masciale, my mother's name.

The Court: So he could have found that in the telephone book, could he?

The Witness: I believe so.

Q. Did he know your address at this time?

The Court: Don't ask this witness what somebody else knew, please.

Q. Did you tell him where you lived? A. No, sir.

Q. Was anything else discussed? A. Just that he would be waiting for me to come back with the narcotics.

Q. At this luncheonette? A. At this luncheonette, sir.

Q. Was anything further discussed? A. If the stuff would be pure, sir, I think it was, how much pure.

Q. And what did you say? A. I says—I don't know if I gave him a given per cent or what I was supposed to pick up, sir.

Q. Did you at this time know where you could obtain any narcotics? A. No, sir.

Q. What happened after you had this conversation? A. Well, he said, "I believe you," and we then proceeded to his car, and we then got in the car. He counted the money he gave me. I took it and I told him I would be back.

Q. And where did you go? Did you leave him? A. That is right.

Q. And where did you go? A. I went to eat Scungillie.

The Court: I am sorry—

The Witness: I went to Mott and Hester Streets.

Q. Did you go to a restaurant? A. Yes, sir.

Q. Did you have dinner at this restaurant? A. Yes, sir.

192 Q. What happened after you had dinner. A. I then left.

Q. And where did you go? A. To First Street and First Avenue.

Q. Did you meet Marshall again? A. Yes, sir.

Q. What happened at that time? A. I gave him the money, sir.

Q. The same amount of money that he had given you? A. Whatever the amount he gave me at first, that is exactly what I gave him back, sir.

Q. Did you have a conversation? A. Yes, sir.

Q. What was the nature of the subject matter of the conversation then? A. I says the one I was supposed to have seen, I says, did not show up, sir.

Q. What did he say to that? A. He wanted to know if there would be any reason for him not showing up, sir.

Q. And what did you say to that? A. I says, "I have no idea."

Q. Was anything further discussed? A. I don't think so.

Q. In fact, did you have anybody? A. No, sir.

Q. Can you give us a reason for why you told him what you did? A. Well, not to make Jake a fool. I was to impress him, and I thought by doing that he would

193 think, you know, that I was on the level with him, sir.

The Court: Will you read that answer?

(Last answer read by the reporter.)

Q. Did you discuss anything further with him at that time? A. About—I was supposed to try to find out why this here individual whom I was never supposed to have met in the first place didn't show up, sir.

The Court: Did anything else happen on that occasion?

The Witness: Yes, sir.

The Court: What?

The Witness: I was supposed to have called him up, sir.

Q. At this telephone number that he had given you? A. The Henry Hudson Hotel, sir, that is right.

Q. And did you call him? A. I called him up, sir.

Q. When? A. The next day, I think. I believe so.

Q. Did you have a conversation? A. Yes, sir.

Q. What was the subject matter of the conversation? A. Well, I asked for him but he wasn't there. Someone else answered the phone.

Q. Did you have any conversation with the other person? A. Yes, sir.

194 Q. Do you know who the person was? A. He gave his name as Tex.

The Court: He gave his name as—

The Witness: No; he didn't give no name at that time, sir.

The Court: So you don't know who it was?

The Witness: No, no, I don't.

* * * * * * * * * * *

195 By Mr. La Carrubba:

Q. Mr. Masciale, have you ever been convicted of a crime before? A. Yes, I have.

Q. And what was the nature of the conviction? A. Conspiracy to commit robbery.

Q. Did the robbery ever take place? A. No, sir.

Q. And was that in the State Court? A. Yes, sir.

Q. And you pleaded guilty to the conspiracy? A. Yes, sir.

196 Mr. La Carrubba: Thank you.

Q. Now, did you have occasion to speak to either Jake or Gene Marshall after this conversation?

The Court: After which conversation? The one on First Avenue and First Street?

Mr. La Carrubba: That is right, sir.

The Witness: Yes, I did.

Q. When and where? A. At the Park Ridge Bar, 75th Street and 13th Avenue.

Q. Do you remember the date? A. It was the day after I met Gene on First Street and First Avenue.

Q. Which we have established as somewhere between February 12th and 15th. Is that correct? A. I gave that answer, sir, but I believe it was just a few days sooner.

Q. Sooner? All right. How did you speak to either one of these—or, whom did you speak to first? A. Well, I called up the Henry Hudson Hotel and I asked for the room number where Gene was at and someone answered the phone. I called at approximately 11 o'clock in the evening and it rang a few times and then someone answered the phone like he just woke up, and when I asked for Gene he says "He doesn't live here. You must have the wreng room number," that night.

197 Q. By the way, with whom did you have lunch this afternoon; at this luncheon recess? A. With a Federal Narcotics Agent, Mr. Eugene Marshall.

Q. Now, have you discussed this matter with me during the luncheon recess? A. No, sir.

Q. Have you had any conversation with me during the luncheon recess? A. No, sir.

Q. All right. Now, after this telephone conversation did you have occasion to speak to either Marshall or Jake? A. Yes, I did.

Q. When? A. The very next night.

Q. Fine. How? A. I called up Gene at the Henry Hudson Hotel and asked for the same room number and he answered the phone.

Q. And did you have a conversation with him? A. Yes, I did, sir.

Q. What was the subject matter of that conversation? A. I told him that I had called the night before and someone else answered the phone and said he didn't live there, and he asked me if I left my name, which I then said yes, my nickname, rather; Chappie, and he said he left word with his partner, who, he claimed, was a buyer too, not to answer any—in other words, if anybody should

198 ask for him, that he was not there.

Q. Was anything further said? A. Yes, sir.

Q. What? A. He wanted to know if I had seen the one I was supposed to have seen when I went to eat at Mott and Hester Streets.

Q. Referring to your meeting at First Street and First Avenue? A. Yes, and I was supposed to tell him why this individual did not show up, sir.

Q. And what did you say to him? A. I told him I did

see the man the next day and that he told me that he could not be bothered, sir.

Q. Was anything further discussed? A. He then wanted to know if I knew of anyone else, since this other man I was supposed to have had didn't want to be bothered.

Q. And what was your answer? A. I told him, "Right at this time I have no one."

Q. Was anything further said? A. He said he would call me up because on week ends he goes to Washington, sir.

Q. Was anything further said? A. That I should have complete trust and faith in him. He would, if possible, call me up from Washington to show that he was there, and if not he would call me up at the airport before leaving.

199 Q. Was there anything further said? A. No, sir.

Q. When was the next time that you spoke to either Paveleski or Marshall? A. Two days later, sir.

Q. How did that come about? A. Jake Paveleski called me up.

Q. Called you where? A. At the Park Ridge Bar and Grill.

Q. Did you have a conversation with him? A. Yes, sir.

Q. What did he say and what did you say? A. He said how am I making out with this Gene—with Gene.

Q. Yes, and what did you say? A. I told him I haven't got nowhere with him.

Q. Was anything further discussed? A. He said, "Well, try and go as far as you can with him," and then just not exactly come right out forward that I don't want to be annoyed with him, so it don't look bad on him. In other words, take it easy with him, because he is liable to get disgusted with him too—meaning Jake Paveleski.

Q. Was anything further discussed at this time? A. I don't believe so.

Q. When was the next occasion that you spoke to Paveleski or Marshall? A. I think this happened to
200 be the very next day. Gene called up, sir.

Q. And where did he call? A. At the Park Ridge Bar and Grill.

Q. Did you have a conversation with him? A. Yes, I did, sir.

Q. What was the subject matter of the conversation? A. If I have tried during the few days he has been away, which he told me he had been trying to locate someone else.

Q. What was your answer to that? A. I told him, I said, "I have tried but I still can't find anyone."

Q. Was anything further discussed? A. I think he and I met at a bar and grill in New York City.

Q. You made an appointment? A. That is right, sir.

Q. During this conversation? A. That is right, sir.

Q. And where was the appointment for? What place? A. The Keyboard, located on 58th Street and Lexington Avenue.

Q. And did you suggest this place to him? A. Yes, I did, sir.

Q. Did you meet with him? A. Yes, I did.

Q. When? A. At 1 o'clock in the morning, sir.

Q. Around approximately how many days previous, or prior, to March 1 of 1954, would you say that this meeting took place? A. Seven to ten days, sir.

201 Q. Did you have a conversation with him at this —was it inside the restaurant or outside that you met him? A. I was seated at the bar and he was supposed to have called me up at 12 o'clock—no—he was supposed to be there at 12 o'clock, and since he was late I waited another hour and he showed up at 1 o'clock in the morning.

Q. Did you have a conversation with him in the bar? A. Yes, I did, sir.

Q. And what was the subject matter of the conversation? A. Narcotics.

Q. What did he say and what did you say? A. I think he said something about I am not trying as if I really wanted to get the narcotics.

Q. What did you say? A. I told him "I am trying."

Q. In fact were you trying? A. No, sir.

Q. Was there anything further discussed? A. He loaned me five dollars, that is all I know, that same night, and left.

The Court: He loaned you five dollars? A. He loaned me five dollars, that is right, sir.

Q. And did you ask him to lend you this money? A. That is right, sir.

Q. Did you promise him anything for this five dollars? A. No, sir.

202 Q. Did you promise to repay him? A. Yes, sir.

Q. Did you repay him? A. No, sir.

Q. Was anything further discussed at this time? A. He said to—"Let's keep in touch with each other."

Q. Anything further? A. I don't believe so.

Q. When was the next time that you spoke or had occasion to speak to either Paveleski or Marshall? A. Well, Jake was the next one I spoke to, sir.

Q. How did you speak to him? In what manner? A. He called me up at lunch time.

Q. Where? A. At the Park Ridge Bar and Grill.

Q. Did you have a conversation with him at the time? A. Yes, sir.

Q. What was the subject matter of the conversation then? A. Well, he always said not to spoil things for him and if I could not possibly help in any way to drop out of the picture or else I will spill his racket, whatever that may be, sir.

Q. And what was your answer to that? A. I told him, I says, "I can't seem to get this man off my back now."

Q. By "this man" you mean Marshall? A. That is right, sir.

The Court: Can I hear that answer?

203 (The answer referred to was read by the reporter as follows: "A. I told him, I says, 'I can't seem to get this man off my back now.'")

Q. Was anything else discussed at this time? A. Yes, sir.

Q. What? A. He said that if I should make—if I should find someone and Gene does buy the narcotics that I should write him a post card saying that he did so. This way he would know that I did and he could see Gene to get some money, since he made the contact with me to make Gene buy narcotics.

Q. Did he give you his address? A. Yes, sir.

Q. And was that the same address that you stated previously, earlier this morning? A. That is right, sir.

Q. Would you repeat it, please? A. 3467 DeKalb Avenue, Bronx, New York.

Q. Thank you. Was there anything further discussed at this time? A. Well, I told him the reason of the writing the post card, and he told me that his phone was being disconnected, he could not pay his bills, and it would be almost the same thing by sending the post card.

Q. Was anything further discussed? A. No, sir.

Q. Now we are around February 21 or so, would
204 you say? A. I think it would be a little—I would say no, sir.

Q. What date would you say that this last conversation that you had with Paveleski took place? A. The 23rd.

Q. About the 23rd? A. That is right, sir.

Q. Now, when was the next time that you had occasion to speak to either Paveleski or Marshall? A. Somewhere around the 25th I would say, sir.

Q. And how did that talk take place? How did that come about? A. I am not sure if I received a phone call from him that day, sir. We did speak but it was on the phone.

Q. With whom? A. With Mr. Gene Marshall.

Q. And what was the subject matter of the conversation at that time? A. I told him, I says, "I am going to see someone else now."

Q. And in fact did you see someone else? A. Yes, I did, sir.

Q. And would that be Seifert? A. That is right, sir.

Q. All right. Now, was there anything further discussed at this time? A. This party whom I was supposed to see, he wanted to know if he was a good source and if I can get him, Gene; any kind of amount of narcotics.

The Court: Any kind what?

205 The Witness: Any amount of narcotics.

Q. And what was your answer to that? A. I says "I believe so."

Q. Was there anything further discussed at that telephone conversation? A. He said if I can get a large amount, that would cost a lot of money, and since he don't know me too well he would rather try to have a sample. This way, if it is what he wants, he would take over all he can get.

Q. What did you say to that? A. I said that I will see what I can do.

Q. When was the next time that you had occasion to speak to either Paveleski or Marshall? A. Probably the next day, sir.

Q. And how did that come about? A. Well, I was supposed to let him know if I have seen this party whom I am supposed to have seen and let him know if I could get the amount that Gene might ask for.

Q. And what was your answer to that? A. I said I haven't seen him yet.

Q. Was anything further discussed at that time? A. He said for me to call him as soon as I make the contact.

Q. Did you call him? A. I may have, sir.

Q. Did you finally make an appointment with him
206 for the Park Ridge Bar? A. Yes, I did, sir.

Q. And was that for March 1st? A. Yes, sir.

Q. And you met with Mr. Marshall at that time? A. Yes, I did, sir.

Q. Now, did you meet with Marshall and Seifert and this fellow who identified himself as Tex on March 2nd? A. Yes, I did, sir.

Q. Was a request made of you by Seifert for the use of the car? A. Yes, sir.

Q. Whose car was that? A. My sister's car.

Q. It was not yours? A. No, sir.

Q. What did you tell Seifert when he asked you for the use of the car? A. I told him "I don't want the car involved in no way."

Q. Did anybody else say anything about the use of the car? A. Well, I met Walter first. I didn't see the agents at that time.

Q. All right. You told this to Walter by yourself? A. That is right.

Q. When you were together? A. That is right, sir.

Q. All right. Did there come a time when you met with the agents? A. Approximately five minutes later, sir.

Q. Did the subject of the use of the automobile come up?

A. Yes, sir.

207 Q. What was said about the use of the automobile?

A. Well, Walter said that if he should walk it would

take him 20 minutes, and if he should use the car he would be back in five minutes, sir.

Q. And what did you say to that? A. I still said "No good."

Q. Did anybody else say anything? A. I am not sure whether it was Gene or Tex that said, "We want to get this thing over as fast as possible."

Q. And did he suggest to you—

The Court: I have forgotten who Tex was.

Mr. La Carrubba: Agent Finney or Finlay.

Q. Did he suggest to you that you should turn the car over to Seifert? A. In a roundabout way he did, sir.

Q. Did you turn over the keys of the car willingly? A. No, sir.

Q. Would you describe the method that you used in which you gave the keys to Seifert? A. I threw them over the front seat, sir.

Q. And were both Marshall and Finlay present at this time? A. Yes, sir.

Q. When were you arrested? A. Some time in April, sir.

Q. Now, this alleged sale took place—

208 The Court: Of what year?

The Witness: 1954.

Q. This sale took place, this alleged sale took place on March 2, 1954; is that correct, sir? A. Yes, sir.

Q. And you were arrested some time in April, the early part of April? A. I can't recall it, sir.

Q. Did you have occasion from March 2nd until April, when you were arrested, to have had any conversations with either Paveleski or Marshall? A. Jake never called no more. Just Gene.

Q. Did Marshall call you? A. Yes, he did, sir.

Q. Where? A. At the Park Ridge Bar and Grill.

Q. Did you have a conversation with him? A. Yes, I did, sir.

Q. How many times would you say between March 2nd and when you were arrested in April did you have further conversations with Marshall? A. Anywhere between seven and ten times, sir.

Q. And what was the subject matter of these conversations? A. He said that Walter pulled a dirty deal and

that the narcotics they received was worthless—to that effect—no good—words like that, sir.

209 Q. Was anything else discussed? A. He wanted to know if—he wanted for me to find Walter to tell him to return the money back.

Q. Did you get any money for this transaction? A. No, sir.

Q. Did you have occasion to talk to Seifert between March 2nd and the time you were arrested? A. Just once, sir.

Q. And when was that? A. The day of the sale, sir.

Q. I am going to ask you, Mr. Masciale, whether or not you in your life have ever used any narcotic drug. A. No, sir.

Q. Whether or not you have ever procured or helped anyone to procure any narcotics other than this transaction referred to during this trial. A. No, sir.

Q. Have you ever had narcotics in your possession? A. No, sir.

Mr. La Carrubba: I have no further questions.

Cross Examination by Miss McCann:

Q. Mr. Masciale, did you introduce Agent Marshall to Walter Seifert? A. That is right, I did.

The Court: What is the answer? Yes?

The Witness: Yes, I did.

210 Q. Did you introduce Agent Marshall to Walter Seifert for the purpose of arranging a sale of narcotics? A. Yes, I did.

Q. Did you at any time speak with Walter Seifert prior to this meeting between Walter Seifert and Agent Marshall? A. Yes, I did.

Q. Did you speak to him about narcotics? A. Yes, I did.

Q. Did you ask him whether or not he could procure narcotics? A. That is right. Yes, I did.

Q. I beg your pardon. A. I did, ma'am.

Q. What was his reply? A. He said that he would see if he knew anyone—inquire in the neighborhood.

Q. When was the last conversation, either by telephone or in person, that you had with the man you know as Jake? A. I would say in the latter part of February of 1954.

Q. Was that before you had spoken to Seifert about obtaining narcotics? A. That is right.

Q. So that at the time you introduced Agents Marshall and Finlay and Mr. Seifert, Mr. Paveleski was no longer in the picture? A. That is right.

Q. Now, you say that from time to time during the period during which you knew Mr. Paveleski, that you had
211 perhaps 150 conversations with him? A. That is right.

Q. And during a number of these conversations he brought up the subject of narcotics, quinine, and so forth? A. That is right.

Q. He offered you propositions as to arranging sales or buys? Is that correct? A. He told me if I knew anyone who would buy morphine or marijuana.

Q. Now, you on each occasion said that you were not interested. Is that correct? A. That is right.

Q. Did you at any time report Mr. Paveleski's activities or questions or conversations to the police department, to the Narcotics Bureau, or to any other enforcement agency? A. No, I did not.

Q. Why did you continue seeing Paveleski in view of the fact that you were not interested in his propositions and you wanted to have nothing to do with this narcotics business? A. On his own persistence, ma'am.

Q. I beg your pardon. A. On his own persistence.

Q. You testified to one conversation with Mr. Paveleski over the telephone in which he asked you to meet him and you, if I recall correctly, stated that you did not want to talk about narcotics, to which he replied that he wanted to discuss his wife's health. Is that correct? A. That
212 is correct.

Q. Did you know his wife? A. No, ma'am.

Q. Did you meet him after that? I mean in pursuance to that conversation? A. Yes, I did.

Q. My recollection is that you testified that another person was present at that meeting. I believe that was a meeting of January 14, if I am correct. If I am wrong tell me. A. To be perfectly honest with you, I don't understand what you mean.

Q. When you had the conversation with Mr. Paveleski,

when he said he wanted to speak to you about his wife's health. A. That was before January 14.

Q. Yes. Now, you met him in pursuance of that conversation. Is that correct? A. Yes.

Q. Now, is that meeting the one of January 14th? A. It was before January 14th.

Q. I see. Was any other person present at that meeting? A. No, ma'am.

Q. Mr. Masciale, during the period between January 14, when you first met Agent Marshall, and March 1st, were you employed? A. At that time, no.

213 Q. Did you tell Agent Marshall that you were trying to arrange the sale because you needed money? A. That is right, ma'am.

Q. Did you tell him why you needed the money? A. To pay my lawyer.

Q. Did you tell him in connection with what case you needed money to pay your lawyer? A. On my previous case.

Q. That is the one that you testified that you were convicted of in a State Court? A. On my own plea of guilty, that is right, ma'am.

Q. Now, you stated that during the course of conversations with Agent Marshall, that you told him all along that you were trying to get a seller for him? A. That is correct.

Q. You also testified, if I recall correctly, that you were not in fact trying to get a seller for him up until the time when you met Walter Seifert. A. Would you mind repeating that question again, please?

Q. I said I believe you also testified that although you told him you were trying to get a seller, that you in fact were not doing so. A. That is right, ma'am.

Q. Yet you continued to string him along as it
214 were? A. That is right.

Q. Is that correct? A. That is right, ma'am.

Q. You testified concerning a sum of money which Agent Marshall is said to have given you prior to March 1. Is that correct? A. That is right, ma'am.

Q. You stated that you took that sum of money and that you went into a restaurant and had dinner. A. That is right.

Q. And came out, and told Agent Marshall that the man you hoped to meet was not there? A. That is right, ma'am.

Q. Did you in fact expect to meet that man that day? A. No, ma'am.

Q. But you did take the money from Agent Marshall, giving him to understand that you were going to procure a seller for him? A. That is right, ma'am.

Q. You testified, in one telephone conversation with Agent Marshall, that he asked you whether or not you were really trying to get narcotics, or that you didn't act as though you were really trying. Is my recollection correct on that? A. That is right, ma'am.

215 Q. Was that before or after Paveleski had withdrawn from the picture? A. I would say it was before, ma'am.

Q. You said that all along you were reluctant to enter into this narcotics transaction. Is that correct? A. That is right, ma'am.

Q. Yet when Agent Marshall gave you an opening to withdraw from it, when you could have answered, yes, you were reluctant, you didn't take advantage of it. Is that correct? A. That is right, ma'am.

Q. Can you tell me again what the date was that you gave Agent Marshall your home telephone number? Approximately. A. Before February 15. I would say maybe the 10th—the 7th or the 10th. Like that. When I met him on First Street and First Avenue.

Q. Are you certain that it wasn't later on? A. I can't be certain.

Q. At that time, when you gave him the phone number, did you tell him your last name? A. No, ma'am.

Q. So that if he had wanted to call you he could not have looked you up in the telephone book. Is that correct? A. Yes, ma'am.

Q. Call you at home, I mean. A. Yes, ma'am.

Q. You stated that when you first met Agent Marshall you were with Mr. Paveleski, and that Mr. Paveleski
216 had asked you to make a good impression on Agent Marshall, to impress him with the fact that you were a big narcotics dealer. Is that correct? A. That is right, ma'am.

Q. Yet you also testified that at that meeting you began

to laugh, and then you said, "What shall we talk about?" Is that correct? A. That is correct, ma'am.

Q. You didn't therefore carry out that impression that you were intending to give. Is that correct? A. Well, it wasn't a laugh. It was more of a smile then.

Q. Yet if you had been a big narcotics dealer you wouldn't have started out by saying "What shall we talk about." In other words, you knew at the time you went in there what you were going to talk about. Is that correct? A. That is right.

Q. Isn't it a fact, Mr. Masciale, that you also told Agent Marshall that you had big gambling contacts and that it was through those people that you had learned about the narcotics traffic? A. That was all Jake's doing, though.

The Court: No; the question is did you tell that to Marshall.

The Witness: Oh, yes. Yes, sir.

217 Q. Do you, in fact, Mr. Masciale, have any connection with gambling or bookies, people of that nature? A. No, ma'am.

Q. Have you ever been arrested on a gambling charge, Mr. Masciale? A. Yes, I have.

Q. What is that? A. Yes, I have.

Mr. La Carrubba: I object to the question as to the arrest. She has no business asking him a question like that.

The Court: Yes, I think that is a sound objection. The jury will disregard the answer.

You have a right to ask him if he has been convicted of a gambling charge.

Q. Were you ever convicted of a gambling charge? A. On my own plea, yes.

Q. How many times? A. Twice.

Q. How many? A. Twice.

Q. Yet you said that you did not know anyone in the gambling business. A. No, ma'am.

Q. Mr. Masciale, did you try to obtain any other persons to act as sellers before you approached Walter Seifert in the matter? In other words, was he the first person you approached? A. Yes, ma'am.

Q. How did you know that he would be able to fill
218 your needs? A. From general conversation.

Q. At that time, or prior to that time? A. Prior to that time, ma'am.

Q. You mentioned a dance hall in the early part of your testimony this morning. Is that right? A. That is right, ma'am.

Q. How many times have you gone to that dance hall, approximately? A. Three times, ma'am.

Q. What were the circumstances under which you went the first time? I mean did you go by yourself or with someone? A. No, ma'am. I went with Jake.

Q. You went with Jake? A. Yes.

Q. Did Jake tell you that there was narcotics business going on in that place? A. No, ma'am.

Q. Did you subsequently find out that there were narcotics buyers in that place? A. What was that?

Q. Did you subsequently find out that narcotics were being bought and sold in that place? A. A half hour later I found out, after I was there.

The Court: May I hear that answer?

The Witness: A half hour later I found out, after I was there.

219 (Last answer read by the reporter.)

Q. You went back there two more times. Is that correct? A. Yes, sir.

Q. Knowing that narcotics trade was going on in that place? A. Yes—not knowing—I don't believe knowing would be the answer. I could not just possibly answer that question.

Q. I understood you to say— A. I went up there to dance.

Q. I understood you to say just in reply to my question a moment ago that you found out a half hour after you got there first that narcotics were being bought and sold there. Is that correct? A. That is right.

Q. Then my question is, yet you went there twice after that, knowing that that trade was going on? A. That is right, ma'am.

Q. Did you at any time report that incident to the police, to the narcotics agents, or to anyone else charged with law enforcement? A. No, ma'am.

Q. You spoke this morning in your testimony on different occasions about the matter of quinine—that Paveleski wanted you to sell quinine; is that correct? A. Find
220 someone who would buy quinine.

Q. You also testified that on one occasion Paveleski gave you a package of quinine? A. Not gave me.

Q. Or put in in your pocket? A. Put it in my pocket, ma'am.

Q. All right. Could you estimate the size of that package? A. Small enough to put in someone's hand.

Q. Now, you also testified, I believe, that you disposed of that quinine in the men's room of the bar. Is that correct? A. That is right, ma'am.

Q. Did you give Paveleski any money for that quinine? A. No.

Q. Did you account to him in any way as to what happened to that quinine which he had given you? A. Yes, ma'am.

Q. What did you tell him? A. I told him the party I have seen told me that he wanted to see if it was quinine, and used it all up, ma'am.

Q. Used it all up? A. Used it up, ma'am, to see if it was quinine.

Q. Do you know what quinine was used for? A. No.

The Court: Will you ask the witness how he knows the contents of that package you are speaking of?

221 Q. How did you knew the contents of the package? A. From what Jake said.

Q. Jake told you that it was quinine? A. That is right.

The Court: He might not have been telling you the truth.

The Witness: That is true.

The Court: So of your own knowledge you don't know what was in it?

The Witness: No, I don't know.

Q. You stated that you don't know what quinine is used

for, yet you were reluctant to undertake to find a buyer for quinine. Is that correct? A. That is right, ma'am.

Q. To go to March 1 and 2—first of all, on the evening of March 1 did you meet Walter Seifert pursuant to a planned appointment, or did you just meet him in the neighborhood? A. Well, I met him with the narcotics agents on March 1, in the evening.

Q. You mean he was already with the narcotics agents? A. No, ma'am.

Q. Or did you meet him before you met the narcotics agents? A. I met him before I met the narcotics agents.

Q. Had you made an appointment to meet him at that time? A. That is right.

222 Q. Was Jake anywhere around at that meeting? A. No, ma'am.

Q. How long before that meeting had he called you last or spoken with you last? Met you or telephoned you? A. I would say anywhere between four and seven days.

Q. So that as far as you knew he was no longer concerned in the transaction. Is that right? A. That is right, ma'am.

Q. Yet you continued to go through with it despite your reluctance to do so? A. That is right, ma'am.

Q. Now, on the morning of March 2nd you again met Agents Finlay and Marshall with Walter Seifert. Is that correct? A. That is right, ma'am.

Q. And you had a car with you? A. That is right, ma'am.

Q. Whose car was that? A. My sister's car.

Q. Did she know that you had the car? A. No, ma'am.

The Court: Please—how would he know what she knew?

Q. Did you tell her that you were taking the car? A. No, ma'am.

Q. You did give Walter Seifert the use of the car. Is that correct? A. That is right, ma'am.

223 Q. With respect to this quinine being used, did you ever, at any time, attempt to find a buyer of quinine for Jake? A. No, ma'am.

Q. Did you ever give him any money for quinine? Did you ever purchase any quinine from him? A. No, ma'am.

Q. Did he complain to you about the fact that the man

you told him had used up all the quinine hadn't paid for it? A. He did not care.

The Court: What was that?

The Witness: He didn't care.

The Court: No; the question is what did he say to you about it. Did he say he didn't care.

The Witness: That is right.

That is right, ma'am.

Q. In other words, he gave you the package of quinine and asked you to find someone to buy it? A. That is right.

Q. Yet when you told him that your prospective buyer had used it all up he didn't even inquire whether you got paid for it or whether you intended to pay him for it? A. I just told him he used it all up, ma'am.

Miss McCann: The Government has no further questions of this witness.

224 Redirect Examination

By Mr. La Carrubba:

Q. You say you were not employed during the time that you had these meetings with Mr. Marshall? A. That is right.

Q. Had something happened prior to these meetings? A. I don't know what you mean, sir.

Q. Did you ever sustain an injury in the course of your employment? A. I can't recall.

Q. Let's see if I can't refresh your recollection. Did you make a claim in Workmen's Compensation for a back injury? A. That question I can't recall.

Q. You don't remember? A. No.

Q. Do you understand the question, Mr. Masciale? A. To be truthful with you I don't know what you are talking about.

Q. Did you get hurt while you were working for somebody? A. I don't know, sir.

Q. Miss McCann asked you whether or not you were stringing along Jake Paveleski.

Miss McCann: I object, your Honor. I don't believe I asked that question.

The Court: I didn't understand you to ask that question.

Start over again without the recitation.

225 Q. Did not Miss McCann ask you whether or not, while you were trying to—while you were telling Jake Paveleski that you were trying to get a seller—but actually you were not trying to do so? A. That is right.

Q. And didn't she say to you or ask you whether or not you weren't stringing Jake along?

Miss McCann: I object to that, your Honor. Those were not my questions.

The Court: I think Miss McCann is right. I did not understand those to be her questions. I think she has referred to stringing along Marshall.

Isn't that so.

Miss McCann: That is correct, your Honor.

Mr. La Carrubba: Very well.

Q. When you said yes to a question that you were stringing along Marshall—why were you stringing along Marshall? A. To impress Mr. Marshall, and I just didn't want to bother with the man, I mean so far as trying to get narcotics or anything; so I could save face with Jake.

Q. Were you then stringing him along on behalf of Jake Paveleski? A. That is right, sir.

Q. And is that why you didn't take this advantage—

Miss McCann: I object to that, your Honor, as
226 asking about defendant's mental process.

The Court: There is no doubt about that.

Mr. La Carrubba: Very well.

Q. You were given, Miss McCann stated, the advantage to get out when Marshall had several of these conversations with you. Miss McCann asked you that question. Do you remember what your answer was? A. I don't know. I said I just didn't telephone the police or anything about his actions.

Mr. La Carrubba: I am sorry. I did not get his answer.

(Last answer read by the reporter.)

Q. Meaning Jake's actions? A. Meaning Jake or Mr. Marshall.

Q. I see. Did you ever give Mr. Marshall a telephone number of other than your home? A. No, sir.

Q. When you told Marshall at the meeting of January 14th at the Park Ridge Tavern that you were a gambler

and you had connections in the gambling world—why did you tell him that?

Miss McCann: I object to that, your Honor, on the ground—

Mr. La Carrubba: This was brought out on cross
227 examination. I respectfully submit that counsel has opened the door for my inquiry as to the reason.

The Court: Well, I am going to overrule the objection but I want to pass along a little advice to you—from an elderly man to a younger lawyer—

Mr. La Carrubba: I can always use it, Judge.

The Court: One of the most dangerous questions which you could ever ask a witness begins with the word "why." He may tell you something that you would rather not hear.

Mr. La Carrubba: I agree, sir. May I withdraw the question, please?

The Court: I think you would be well advised if you did.

Q. Did you tell Marshall that you were connected with the gamblers—with the gambling world—in order to further—

The Court: Now, don't—please—please don't tell him what you want him to say under the guise of asking a question.

Q. When did you first meet Mr. Seifert? A. A few days before March 1st.

Q. Would you tell the jury, please, the circumstances surrounding this meeting that you had with Seifert?
228 Where did you meet him? A. Eastern Parkway and Atlantic Avenue.

Q. On the street? A. In this restaurant.

Q. Carlucci's Restaurant? A. LaCasa Restaurant.

Q. La Casa? A. Yes, sir.

Q. Were you introduced to him by somebody? A. That is right.

Q. Did you have a conversation with him? With Seifert? A. Yes, sir.

Q. What was the subject matter of that conversation? A. About these parties.

The Court: About what?

The Witness: Parties and narcotics.

Q. Did you ask him, Seifert, whether or not he could obtain narcotics? A. Yes, I did, sir.

Q. Did he say that he could? A. He said he would try, sir.

Q. Did you know whether or not he could obtain narcotics? A. No, sir.

Q. Now, Miss McCann covered the subject of your attending this dance hall three times. A. That is right.

Q. And you say the subject of narcotics came up at that time?

229 The Court: He said he learned a half hour after he arrived the first time—

The Witness: That is right, sir.

The Court: —that there was business in narcotics being done there.

That is what he said.

Q. From whom did you get this information?

The Court: Is that important?

Mr. La Carrubba: Yes, sir.

A. From Jake Paveleski.

Q. Did you get that information from anyone else? A. At that time, no, sir.

Mr. La Carrubba: I have no further questions.

Miss McCann: I have just one question, your Honor.

Recross Examination

By Miss McCann:

Q. Mr. Masciale, you testified that you asked Seifert whether or not he could obtain narcotics for you. Is that correct? A. That is right, ma'am.

Q. Yet you also stated that you didn't want to be involved in this narcotics transaction. Is that right? A. That is right, ma'am.

* * * * * * * * * * * *

232 **Renewal of Motions and Denial Thereof**

Mr. La Carrubba: The defendant rests, if your Honor please.

Miss McCann: The Government rests, your Honor.

The Court: Defendant renews all motions made at the close of the Government's case?

Mr. La Carrubba: Yes, with the additional thought if your Honor please, that your Honor should direct this jury to come in with a verdict of not guilty on the ground

that this defendant never had any thought in mind of trafficking in or making a sale of narcotics until such time as this Jake Paveleski, admittedly an agent of Gene Marshall, an agent of the Narcotics Bureau, instilled that thought in his mind.

The Court: I think you are making an argument to the jury.

If you mean that the evidence presents the case of entrapment I don't agree with you.

233 Is that the basis of your motion?

Mr. La Carrubba: That is the basis of my motion and I respectfully ask your Honor to take the case of O'Brien against the United States in which a very similar set of facts was presented, in which one Lyle—

The Court: Please don't argue the case. What is the case?

Mr. La Carrubba: O'Brien against the United States of America, 51 Federal Reporter, 2nd Series, Page 674; which case has been cited—

The Court: All right, you have cited the case.

Mr. La Carrubba: —time and time again.

The Court: Have you stated your motion?

Mr. La Carrubba: I would like to add this to my motion, if your Honor please, that there is uncontroverted testimony by the defendant that he was induced to enter into this one sale by an agent of the United States Government and that that—

The Court: I don't so understand the testimony but I understand your motion, and the motion is denied.

* * * * * * * * * * *

262 **Charge of the Court—September 30, 1955**

The Court: Members of the Jury:

I am going to state at the outset what your problem is and then I will go back and cover the technical requirements of the law.

Since the fact of the sale of the narcotics by Seifert to Marshall is not in dispute you are relieved of any duty to ascertain whether the sale took place.

The burden of the defense challenges your most careful attention. The defense relies on what is called entrapment. Now, that means that the defendant asserts that the testi-

mony shows that the sale of these narcotics, or of this package of narcotics, was brought about because the Government induced the defendant to play whatever part he did play in that transaction, and from that the defendant argues that since the Government—and the testimony I will discuss in a moment—since the Government was the active agency in bringing about this transaction the defendant must be turned loose; he must be found not guilty.

263 Now, that is not the law. The law says that the Government may provide the means whereby a violation of the law is established but it may not poison the mind of a person who would not otherwise indulge in that conduct, and then hold him to be guilty.

In other words, the task of the jury is to ascertain from the evidence in the case whether this defendant was ready and willing to participate in this sale of narcotics, or whether he was not ready and willing; whether there was not in his mind an acquiescence or a willingness to go through with an illegal transaction.

Now, that isn't too easy an idea to wrestle with, and so I mention it at the outset so that you will follow the rest of the charge with that initial suggestion in mind.

The indictment charges two alleged offenses. One is the sale of the narcotics. The second is a conspiracy on the part of this defendant and Seifert to make the sale.

Now, you must understand that a sale of narcotics, if established, can involve more than one offense denounced by the law, and that is the reason that this indictment contains four counts relating to the sale. There is one count relating to the conspiracy.

264 With regard to the sale, Count 1 charges that on or about the 2nd of March, 1954, within the jurisdiction of this Court, the defendant Seifert, who is not on trial before you you will recall, did sell and facilitate the sale of one ounce of 196 grains of heroin Hydrochloride, a derivative of opium, knowing the same to have been imported contrary to law.

Seifert, as has been stated to you, has pleaded guilty. He has pleaded guilty to Counts 3 and 5, and as to the other counts in the indictment there has been a severance. That means that he isn't before you to answer Count 1.

So that as Count 1 does not refer in terms to this defendant, Frank Masciale, you will disregard Count 1 in returning your verdict.

Count 2 alleges that on that date, and within the jurisdiction of this Court, Seifert and Masciale did unlawfully sell the same drug that we call heroin, which was not in or from an original package bearing tax stamps required by law.

Just by way of explanation, there are legal sales of narcotics. If taxes have been paid on them the Government can trace them, and they can be sold under prescription. So that the necessity for taxes has its place, and the allegation of Count 2 is that this sale was of
265 heroin in packages not bearing stamps. Therefore as to Count 2 your verdict will be guilty or not guilty.

Count 3 alleges that at the same time, and in the jurisdiction both defendants, Seifert and Masciale, did unlawfully sell a narcotic drug—this heroin—not in pursuance of a written order form issued by the Secretary of the Treasury. So you see, that is still a different offense. You will understand that the necessity for order forms is in order to give the Government a record through which illegal transactions can be traced and legal transactions can be validated. That is another branch of the law that this sale is alleged to have violated. So that as to Count 3 your verdict will be guilty or not guilty as to this defendant.

Now as to Count 4, referring to the same defendant and the same transaction, the allegation is that Walter Seifert and Frank Masciale did use a motor vehicle, to wit, a 1950 Chevrolet sedan, bearing 1954 New York license No. NS 68-67, to facilitate the sale of a narcotic drug, namely, this package of heroin, contrary to still another branch of the law. Therefore as to that count your verdict will be guilty or not guilty.

Count 5 alleges a conspiracy on the part of Seifert and this defendant and others to sell a narcotic drug,
266 to wit, heroin, knowing the same to have been imported contrary to law, and in pursuance of the conspiracy the indictment charges that they did the follow-

ing things—and I will explain why that is necessary in a moment:

That on or about March 1, 1954, the defendants Masciale and Seifert did meet in Carlucci's Restaurant at 1849 Eastern Parkway, and did have a conversation concerning the sale of narcotics;

That on or about March 1, 1954, the defendant Seifert did make a telephone call to a person to the grand jury unknown;

That on or about March 2, 1954, this defendant and Seifert did meet and have a conversation concerning the sale of narcotics;

And that on the same day the defendant Masciale did loan an automobile, to-wit, a 1950 Chevrolet sedan, bearing the license number that I have given, to the defendant Seifert for the purpose of facilitating the sale of narcotics.

Now you will say, "Why is there a separate conspiracy charge?" I will try to answer that question.

When two or more people commit an offense against the law the law sees in their conduct two things: The offense itself, and a meeting of their minds prior to the
267 commission of the offense and an agreement between them to commit the offense—something which is separate and apart from the offense itself because, the law says, two people don't commit an offense unless there has been a prior understanding between them that it would be done. That is the conspiracy. It means a kind of loose partnership, a joint enterprise, an agreement that they will break the law.

Now, in order that that offense be spelled out there must be evidence that not only did they agree to do the thing, but that they took one or more steps to carry the agreement into effect; that they did one or more things to carry out that joint purpose. Those are called the overt acts. Unless something was done to carry the agreement into effect it just kind of disappears in thin air. But if one or more things are shown to have been done then the conspiracy has been proven.

As you probably know, and if you don't it is my duty to remind you, or to state if and perhaps remind you, the defendant is presumed to be innocent. That presumption attaches to him from the opening of the trial until

the jury shall return with its verdict. And in order to overcome the presumption of innocence the burden of proof rests upon the Government to demonstrate
268 that which the indictment alleges beyond a reasonable doubt, but because the indictment is not a self-proving document at all. The indictment is a charge, and the fact that the charge is made doesn't prove that the charge is true. So that the burden of proof rests on the Government—proof beyond a reasonable doubt.

Now, reasonable doubt is a doubt that is present in your minds after you have examined all the testimony, and which doubt is the product of the application of your reasoning faculties to the evidence. It is your reasoning faculties that are enlisted. That means, of course, that your emotions play no part in your deliberations. You may be sympathetic to the Government. You may be prejudiced against the Government. You may be sympathetic toward the defendant. You may be prejudiced against the defendant. Those are two of our best known and most frequently exhibited emotions. You must not resort to them. You cannot do that if you are to live up to the terms of your oath which you took when you entered the jury box.

A favorite illustration with me in connection with this reasonable doubt requirement, is to refer you to what takes place around the first of each month when you exam-
ine the statement that your bank sends you. It lists
269 your deposits and it lists your withdrawals—your checks and your deposits—and it states your balance and you verify it. Now, that is an unemotional, purely intellectual effort. You may be disappointed at the smallness of your balance. You may be elated at its large dimensions. It doesn't make any difference how you feel about it. There it is. There are the figures.

So it is that you must view and examine the evidence in the case. What is the evidence and what does it teach you? It doesn't make any difference whether you like it or dislike it. That means that when the law says that you must be convinced of a defendant's guilt beyond a reasonable doubt it is only your reasoning faculties that are enlisted and you are expected to function in response to the teachings of your reasonable faculties.

Let's now run over the case very briefly so as to refresh your memory as to who the witnesses have been. For the Government there was the agent Eugene Marshall, the agent Bennet, the chemist Goldman, the defendant Seifert, the agent Mercado, and the agent Costa; six in number, five being agents and one being Seifert who has pleaded guilty. Seifert is an accomplice by his own story.

270 The evidence, or rather the testimony, of an accomplice is thoroughly competent. It may be received and may be considered by the jury under the law in the Federal Courts, but in weighing that testimony, in deciding how far you will rely upon it, you must bring to bear the closest scrutiny, accepting only that which you find to be credible, and using a little bit more severe test than you would in the case of a person not an accomplice.

Now, as to all the witnesses in the case, if any one of them has testified falsely with respect to a material issue in the case you have the right to disregard his entire testimony because of that false element. Also you have the right to reject that which you find to be false and rely upon the balance if you find that the balance constitutes credible testimony. That is one of the tasks that the jury must perform in weighing the evidence in a case.

Of course I must remind you that for the defense the witnesses were the defendant himself. Then there was Magaro who was called yesterday, who said something about a telephone number in a candy store. I think he said—I will try to get that straight—he said he hangs out at 73rd Street and First Avenue, in an ice cream

271 parlor. He knows the defendant, and that the defendant does not hang out there. And he says the telephone number is BE 2-9323. And then there was the witness Occhino, called this morning, and what he said is so fresh in your minds that I shall not attempt to restate it.

With regard to the defendant as a witness it is necessary to remind you that he had the perfect right to take the witness stand; also he had the right not to take the witness stand. He had the right to stand mute. Having offered himself as a witness it becomes your duty to examine his testimony with the same degree of care that you examine all other testimony in the case. In its persuasive

qualities it is neither better nor worse because it happens to proceed from the lips of the defendant who is of course the only person interested in the outcome of this case. So that when you weigh his testimony you are required to reflect that that which he says comes from the lips of the only legally interested witness who has testified before you.

As to the Government witnesses, there are occasional statements that they are interested. With those statements I take the liberty of disagreeing. The Government witnesses are employees, and there is no reason to
272 believe, certainly from the testimony in this case, that they have anything to gain or lose by the verdict of this jury. They have told you how they have tried to do their duty. You had an opportunity to observe them. You have the right to accept or reject that which they say precisely as you would if they were not in the Government employ. They are not legally interested in the outcome of the case.

Now I will go back to that subject that I mentioned at the outset—this question of entrapment—and I do that because, as I must remind you, the defense does not dispute the transaction related by the Government witnesses—the sale and delivery of this package of heroin. The defendant's case turns upon this question of whether he was induced, being otherwise not inclined, to disobey this branch of the law; that he was induced to do it, first, through interviews with this person who is known to us by two names, Jack Kowel and Jack Paveleski. Paveleski was the name stated by the defendant, and I think it was Kopel or Kovel—what was it—

Miss McCann: Kowel—

The Court: That was the name, yes—Jack Kowel, given by Marshall.

I guess there isn't any doubt that Marshall and the
273 defendant were talking about the same man. You will recall that the first interview that Marshall had with this defendant was on the 14th of January, 1954, and he met him with Kowel along. Now, Marshall said that Kowel was either an employee or a representative of Marshall. I am not too clear on that. He said, "a special employee of mine." So that that being the only testimony

in the case you will accept it. The mere presence of Kowel at that first interview tends to suggest that that must have been so.

Now, the general subject of the interview of course was the purchase of narcotics, and I don't understand—and if I am wrong disregard what I say—I don't understand that the defendant denies that. He told you at great length of a series of interviews, personal and over the telephone, between him and this man Kowel, that preceded the interview of January 14, and thus we have the defendant's version that this purchase was suggested to him by the Government.

Since Kowel is not a witness and Marshall has told you that Kowel was there you may wish to accept the defendant's version of Kowel's initial suggestion to him.

I told you at the outset that the law is that if the Government does the inducing the Government then
274 must demonstrate to you that the defendant was not averse to going along; that the defendant was willing to follow up and to do whatever was required in order to bring about a sale of this heroin. The subject has received the attention of the courts from time to time and because I think it may help you to reach a conclusion I am going to ask you to listen while I read a few passages from the opinion in the case of the United States vs. Sherman, 200 Fed. Reporter, 2nd, at Page 880, which was also a narcotics case, and I am reading from Page 882 where reference is made to a Supreme Court decision, and this language was used:

"The controlling question is whether the defendant is a person otherwise innocent whom the Government is seeking to punish for an alleged offense which is the creative activity of its own officials."

Continuing, the opinion from which I am reading says:

"We suggested three excuses for an inducement. An existing course of similar criminal conduct; the accused already formed design to commit the crime or similar crimes; his willingness to do so as evidenced by a ready complaisance."

275 Now, again from the same page:

"As we understand the doctrine it comes down to this: That it is a valid reply to the defense"—that is, the defense of entrapment—"if the prosecution can satisfy the jury that the accused was ready and willing to commit the offense charged whenever the opportunity offered. In that event the inducement which brought about the actual offense was no more than one instance of the kind of conduct in which the accused was prepared to engage; and the prosecution has not seduced an innocent person but has only provided the means for the accused to realize his pre-existing purposes. The proof of this may be by evidence of his past offenses, of his preparation, even of his ready complaisance. Obviously it is not necessary that the past offenses proved shall be precisely the same as that charged, provided they are near enough in kind to support an inference that his purpose included offenses of the sort charged."

Please accept that as the law. It will be for you to say, having examined the evidence, having listened to the testimony of the witnesses whether this defendant has been shown by the margin of proof that I have explained
276 to have been "ready and willing" to commit the offense charged.

Are there exceptions to the charge? I will deal with the requests in a moment.

Mr. La Carruba: If your Honor please, your statement as to the testimony of the boy, the witness Charles Magaro, with reference to the location of the candy store—I think perhaps, your Honor, it may have just slipped your mind. It is located at 73rd Street and Fifteenth Avenue rather than First Avenue.

The Court: If I made a mistake in that I should correct it as counsel admonishes me, and I have to remind you, if I haven't already stated it, that my understanding of the testimony isn't binding on you. If anything that I have said about the testimony differs from your memory or your understanding, disregard what I say and rely on your own memory and your own understanding.

Now, are there any other exceptions? I am not talking about requests.

Mr. La Carrubba: No, sir.

I believe you made the statement, sir, that some remark was made that Marshall would have been, or the agents who testified would have been, legally interested witnesses.

I don't think that I made any such statement.

277 The Court: No, I don't mean to suggest that you did.

Mr. La Carrubba: Thank you.

I believe that the testimony of Marshall indicated that he paid Kowel or Pavelski out of authorized funds.

The Court: I think there is such testimony.

Mr. La Carrubba: Thank you.

The Court: I thought that that was covered when I said he was a special representative.

Mr. La Carrubba: Thank you. I have no further exceptions, sir.

The Court: Do you wish to press your Requests Nos. 1 and 2 in view of the law which I have read to the jury from this case?

Mr. La Carrubba: No, sir.

The Court: I will mark those withdrawn.

Mr. La Carrubba: Yes, sir. Thank you.

The Court: I think that I have explained that Pavelski must be regarded under the testimony to have been a special representative of Marshall. Does that cover No. 3?

Mr. La Carrubba: Yes, sir. I withdraw request No. 3.

The Court: If you press your Request No. 3 I

278 shall have to deny it.

Mr. La Carrubba: No. I withdraw No. 3.

The Court: I am speaking of No. 3 now.

Mr. La Carrubba: That is correct, sir.

The Court: You withdraw No. 3?

Mr. La Carubba: Yes, sir.

The Court: I think No. 4 has been covered in the main charge.

Mr. La Carrubba: Possibly so. I don't deny that that may have been covered. However, I think the language perhaps may be more understandable to lay persons rather than the legal language as used in a charge.

The Court: Well, I tried to make it clear that the testimony shows that the Government suggested to the defendant through Marshall and Pavelski that which took

place. I have tried to make that clear but I cannot—I cannot—charge according to the closing sentence of this request.

Mr. La Carrubba: I respectfully except to your Honor's ruling.

The Court: All right.

Mr. La Carrubba: Thank you, your Honor.

I think, as to No. 5, it has been covered by your Honor.

279 The Court: Well, I tried to make it clear to the jury.

Mr. La Carrubba: That is correct. Thank you, your Honor.

The Court: Shall I say that that is withdrawn or do you wish me to—

Mr. La Carrubba: Yes, sir. Yes, your Honor. That is withdrawn.

The Court: Now with regard to the Government's requests:

The first request of the Government is that the Court charge—and perhaps I did not make this clear—that the law provides that whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission is a principal. I so charge.

And, continuing, this means that if you find in the evidence, and beyond a reasonable doubt, that the defendant did aid, induce or procure the sale of narcotics by another you may find the defendant guilty. It is not necessary for you to find that the defendant actually made the sale or delivery of the heroin if you find that he aided, induced or procured the sale.

Do you wish to press Nos. 2 and 3?

280 Miss McCann: I will withdraw Nos. 2 and 3. I think you have covered them.

No. 2, your Honor, the last portion—the last eight lines or so I request your Honor to charge.

The Court: No. 2?

Miss McCann: Yes, beginning with the word "however"—nine lines from the bottom, your Honor.

The Court: Yes, I see what you mean. Well, I will not include the word "however." I will charge so much of request No. 2 as follows:

"There is a difference between entrapment and the use of informers or decoys by the Government for the purpose of detecting crime. There are many instances where it is absolutely necessary to resort to the use of decoys for such purposes and no criticism can be offered for such method. It has long been established that the use of decoys and informers is legitimate."

In that connection I will have to tell you that there is no testimony of the use of a decoy in this case.

No. 3 is withdrawn?

Miss McCann: That is correct, your Honor.

The Court: Do you press No. 4?

Miss McCann: I believe your Honor has covered that. I withdraw that.

281 The Court: Request No. 5:

You are entitled to consider all the evidence as to whether the Government agent had reasonable cause to believe the defendant was a person disposed to commit the offense charged in this indictment.

I am changing it in that way.

Now as to the alternate juror: You will probably be glad to know, Madam, that you are excused. Thank you for your attendance.

The jury will now retire and deliberate on the verdict.

(The jury thereupon retired to deliberate on the verdict at 11:50 a. m.)

(The defendant's requests to charge follow:)

IN THE UNITED STATES DISTRICT COURT

Defendant's Request to Charge

1. "If an officer, or person places into the mind of someone else that he should commit a crime, when it was not in that person's mind until it was so placed there, and he goes ahead and commits that crime, he cannot be convicted if the person who placed that in his mind does it for the purpose of entrapping him," finding so you must acquit.

"Public policy forbids that officials sworn to
282 enforce the law should seek to have that law violated." (O'Brien v. United States, 51 Fed. Rep. 2nd, 674) Cited with approval, (United States of America v. Eddie Carr, 219 F. 2nd, 876.)

2. If you find that the testimony of the defendant Frank Masciale, concerning conversations with Jack Pavelsky, was not controverted or contradicted by direct evidence, and is not opposed to the probabilities; nor, in its nature, surprising or suspicious, there is no reason for denying to its conclusiveness. (Null v. Littauer, 162 N. Y. 569.)

3. You are entitled to consider whether or not Jack Pavelsky was an agent of the government, during the period of time that he was paid out of authorized government funds. If you so find you may acquit.

4. You are entitled to consider whether or not there is reasonable cause to believe that the defendant Frank Masciale was a person disposed to commit the specific offense charged had he not met Jack Pavesky and Gene Marshall. Finding that to be in the negative you must acquit.

5. "The question of entrapment is one for the jury to decide." (United States of America v. Eddie Carr, 219 F. 2d 876).

283 (The Government's requests to charge follow:)

IN THE UNITED STATES DISTRICT COURT

Government's Requests to Charge

1. The law provides (18 U. S. C., section 2) that "Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal." This means that if you find upon the evidence and beyond a reasonable doubt that the defendant did aid, induce, or procure the sale of narcotics by another you may find the defendant guilty. It is not necessary for you to find that the defendant actually made the sale or delivery of the heroin if you find that he aided, induced, or procured the sale. Under the law a person who aids, induces, or procures the commission of an offense is just as guilty as the person who actually commits the offense.

2. Much has been said during the trial concerning entrapment. Entrapment is an expression used to indicate a situation in which the criminal design is conceived in the mind of the officer and does not originate with the accused. It is a situation in which a Government Agent originates the crime in his own mind and then by persuasion or deceit

induces a law-abiding citizen to commit a crime which he would not have committed in the absence of such inducement. However, "There is a difference between
284 entrapment and the use of informers or decoys by the Government for the purpose of detecting crime. There are many instances where it is absolutely necessary to resort to the use of decoys for such purposes, and no criticism can be offered for such method. It has long been established that the use of decoys and informers is legitimate." (Price v. United States, 56 F. 2d 135, 136).

3. "Entrapment exists only when the government agents induce and originate the criminal intent of a defendant; there is none where the criminal intent is already present, and the agents merely afford the opportunity for the commission of a crime." (*United States* v. *Lindenfeld*, 142 F. 2d 829, 831, Chief Judge Clark writing the opinion affirming the case on appeal from the Eastern District of New York.)

4. Entrapment does not exist where the Government Agent has reasonable cause to believe that the accused would commit the crime if afforded an opportunity to do so and there is nothing unlawful on the part of the Government to use third persons, or decoys, for the purpose of ascertaining whether the person suspected will commit a crime.

5. You are entitled to consider all the evidence as
285 to whether the Government Agent "had reasonable cause to believe the defendant was a person disposed to commit an offense. (*Sorrells* v. *United States*, 287 U. S. 435, 458.)

(At 2:45 p. m. the jury returned with its verdict, whereupon the following ensued:)

IN THE UNITED STATES DISTRICT COURT

Verdict

The Clerk: Members of the jury, have you agreed upon a verdict?

The Foreman: Yes.

The Clerk: In the case of United States against Frank Masciale how do you find the defendant? Guilty or not guilty on the second count of the indictment?

The Foreman: Guilty.

The Clerk: How do you find the defendant? Guilty or not guilty on the third count of the indictment?

The Foreman: Guilty.

The Clerk: How do you find the defendant? Guilty or not guilty on the fourth count of the indictment?

The Foreman: Guilty.

The Clerk: How do you find the defendant? Guilty or not guilty on the fifth count of the indictment?

The Foreman: Guilty.

The Clerk: Members of the jury, as the Court has received your verdict you say you find the defendant
286 guilty on Counts 2, 3, 4 and 5, so say you all?

The Foreman: Right.

Motion to Set Aside Verdict and Denial Thereof

Mr. La Carrubba: I respectfully move at this time, if your Honor please, to set aside the verdict of the jury as being contrary to the weight of the evidence during this trial. The testimony of the defendant with reference to these conversations had with Jack Pavelski, by whom he alleges he was induced to enter into this conspiracy to sell the narcotics was uncontroverted. It was believable as a matter of law. It was not subject to suspicion, and it is probable that it occurred as set forth by this defendant during his testimony, and the verdict of the jury is contrary to its weight.

The Court: The motions are denied and the verdict is received, recorded and filed.

---

287 IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

No. Cr-43820

Judgment and Commitment—October 13, 1955

On this 13th day of October, 1955 came the attorney for the government and the defendant appeared in person and with Counsel.

It Is Adjudged that the defendant has been convicted upon a verdict of guilty of the offense of violating T. 26,

U.S.C., Secs. 2553(a) and 2554(a); T. 18, U.S.C., Sec. 2 in that on or about March 2, 1954, in the Eastern District of New York, he, with another, did unlawfully sell one (1) ounce and 106 grains of Heroin Hydrochloride in an untaxed package and not in pursuance of a written order on a form issued by the Secretary of the Treasury; and from an unknown date of March 2, 1954, he conspired to sell said drug, knowing same to have been imported contrary to law, in violation of T. 21, U.S.C., Sec. 174, as charged in Counts 2, 3, 4 and 5 and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

288 It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of three (3) years and is fined the sum of $100.00 on each of Counts 2, 3 and 5, and is to stand committed until fines are paid or otherwise discharged as provided by law. Sentences of imprisonment are to run concurrently. Court grants defendant's motion to dismiss Count 4.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshall or other qualified officer and that the copy serve as the commitment of the defendant.

Mortimer W. Byers
United States District Judge.

289 IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 356—October Term, 1955.
Docket No. 23977
(Argued May 9, 1956)

UNITED STATES OF AMERICA, *Appellee*,

v.

FRANK MASCIALE, *Defendant-Appellant*.

Before Clark, *Chief Judge*, Frank and Hincks, *Circuit Judges*.

Opinion—Aug. 22, 1956

Appeal from the United States District Court for the Eastern District of New York. Mortimer W. Byers, *Judge*.

Frank Masciale appeals from his conviction of violation of the revenue laws and of the conspiracy statute. Affirmed.

Marie L. McCann, Assistant United States Attorney, Eastern District of New York, Brooklyn, N. Y. (Leonard P. Moore, United States Attorney, Brooklyn, N. Y., on the brief), *for appellee*.

Merrell F. Clark, Jr., New York, N. Y., *for defendant-appellant*.

290 Hincks, *Circuit Judge*:

The defendant appeals from his conviction on three counts of an indictment, two of which charged him with a sale of narcotics on March 2, 1954, in violation of two sections of the revenue laws, and the third (Count 5 of the indictment) with conspiracy to make a sale, in violation of 21 U.S.C. § 174.

As stated in his brief, "Defendant does not deny that the narcotics sale took place; he does not deny that he participated, though not directly, in that sale." Instead, he invokes the defense of entrapment. On the ground that "the Government failed to produce any substantial evidence that the defendant was ready and willing without persuasion to commit the offense" he predicates error on the failure of the trial judge to direct an acquittal. No criticism is made, or could be made, of the judge's charge.

It is not disputed that one Marshall, an agent of the Bureau of Narcotics, in December 1953, informally em-

ployed one Kowel to help in uncovering narcotics "pushers"; that on January 14, 1954, Kowel introduced Marshall to the defendant, representing him (Marshall) to be a buyer of narcotics in large quantities; that in the ensuing weeks both Marshall and Kowel were in frequent touch with the defendant in connection with a possible sale of narcotics; that the defendant himself sought out one Seifert and introduced him to Agent Marshall on March 1, 1954, for the purpose of arranging a sale; that the sale was accomplished on the following day.

Marshall testified that on January 14, 1954, after Kowel [Jack] had introduced him to the defendant as "Chappie," the following transpired: "Chappie, Jack and I then sat down in one of the booths and almost immediately we started to discuss the narcotics traffic. I told Chappie that

291 I was interested in large quantities of drugs, heroin to be exact, and not as a street pusher, if I may quote, but that I had—I transacted my business—I posed as a seller out of New York City and I was only interested in good and large quantities, and he should tell me right away if he is not the person to see, then we will finish this conversation pleasantly right then and there"; that thereupon he [the defendant] inquired as to the extent of Marshall's activity in narcotics and said that he, Masciale, "was primarily a gambler and that he was not a narcotics trafficker as such, that his business is mostly gambling but that he knew the right people in the narcotics traffic * * * and knew someone who he considered high up in the narcotics traffic to whom he would introduce me and that I was able to get * * * 88 per cent pure heroin from this source." Agent Marshall further testified that after numerous telephone calls and several personal meetings with the defendant, who said he was interested in sales because of his need of money, they met, together with Agent Finlay, on March 1, 1954, when the defendant introduced them to Seifert who said he could arrange to supply them with heroin and who did in fact arrange a sale of an ounce to Marshall for $400. To facilitate the consummation of the sale, Marshall testified, the defendant loaned his automobile to Seifert.

The defendant himself testified that on January 15, when he met Marshall for the second time, Marshall brought up

the subject of narcotics and asked, "Are you going to get the ball rolling?" to which he (the defendant) replied: "I am trying"; that on about February 15, he met Marshall who offered $400 for a sample of heroin and that he then replied: "I have got to have the money first"; that thereupon Marshall gave him the money which he later returned with the explanation that the expected source of the sample "did not show up." He testified that on about February 25 he told Marshall he was going to approach another source from whom he believed a purchase
292 might be made in a large amount and that he himself approached Seifert, who was this other source, and after a favorable contact with Seifert called Marshall by telephone for a meeting for the express purpose of arranging a sale.

It is true that the defendant further testified that Kowel over a period of several months had urged him to engage in the narcotics traffic, pointing out the pecuniary rewards which might be expected both by the defendant and by Kowel; that for months he had rebuffed Kowel's importunities; that in meeting Marshall and purporting to cooperate he was in fact merely "stringing him along" in order to increase Kowel's prestige in the eyes of Marshall. However, the jury may well have believed the defendant when he testified as to his voluntary cooperation with Marshall throughout the whole period of their acquaintance and may have thought him lying when he testified that his experience in the traffic was nil and that his cooperation with Marshall in the earlier stage of their acquaintance was feigned.

On the facts, we think it plain that this is a case in which both the sale and the conspiracy were induced by Marshall, a Government agent. That being so, the burden was on the Government, by way of reply to the defense of entrapment, to prove a sufficient excuse for the inducement. *United States* v. *Sherman*, 2 Cir., 200 F. 2d 880.[1] In that

[1] In *United States* v. *Sherman*, this court gave its considered interpretation of *Sorrells* v. *United States*, 287 U.S. 435. There have since been no developments in this field which suggest that we should now overrule or modify this interpretation of *Sorrells* then reached. Neither *Sherman* nor *Sorrells* hold that proof of a prior conviction, or even direct proof of a prior commission, of the same or of a kindred offense is essential to make out a valid reply to the defense of entrapment.

c[illegible], this court said: "It is a valid reply to the defense, if the prosecution can satisfy the jury that the accused was ready and willing to commit the offense charged, whenever the opportunity offered." And in the same case
293 it was said that, once the inducement is shown, the prosecution "had to satisfy the jury that" the defendant "did not need any persuasion; but that he stood ready to procure heroin for anyone who asked for it."

In the *Sherman* case, it is true, it was held that the prosecution had failed to prove a valid reply to the defense of entrapment. In the case at bar, however, the evidence against the defendant is palpably stronger. There was evidence that the defendant here in his first meeting with the Government agent, who had been introduced to him as a prospective buyer of narcotics, boasted that "he knew the right people in the narcotics traffic" and promised an introduction. Also in this case there is the testimony of the defendant himself that in his second meeting with Marshall he said "I am trying" to find you (Marshall) a source of supply and that when he later had made a favorable contact with Seifert he himself called Marshall to arrange the sale.

Nor are the proofs of the Government's reply insufficient for failure to show that the defendant's conduct in arranging the sale was induced without persuasion *by Kowel*. For, as noted above, the defendant himself testified that he had consistently rebuffed Kowel's importunities. Moreover, he further testified that, when finally at Marshall's inducement he made his contact with Seifert, Kowel "was no longer in the picture" and assented to the question, "So that as far as you knew he was no longer concerned in the transaction?"

The case on appeal has been ably presented by assigned counsel for whose assistance the court is grateful. Nevertheless, notwithstanding the excellence of the advocacy, we think the evidence sufficient to warrant a finding that the defendant at Marshall's behest stood ready without persuasion to make arrangements for illegal sales whenever the opportunity offered. The crucial question was one
294 for the jury. The request for a directed acquittal was rightly refused.

On appeal, other alleged errors are assigned which re-

quire scant comment. Prejudice is asserted because of the noise resulting from construction in the street outside. However, granted that there was some extraneous noise in the court room, we think the condition not materially prejudicial to the defendant. After all, most of the witnesses were those proffered by the Government. The judge's effort to expedite the trial appears to have been altogether proper and free from resulting prejudice. Lastly, it is contended that the judge, in denying the defendant's motion for a verdict of acquittal, in the presence of the jury expressed the view that the defense of entrapment was not borne out by the evidence. In this comment of the judge we find no error. Moreover, the judge sufficiently protected the defendant from any improper prejudice by instructing the jury that it was for them to say whether the defendant was ready and willing to commit the offense charged, with a final caution as follows: "If anything I have said about the testimony differs from your memory or your understanding disregard what I say and rely on your own memory and your own understanding." Affirmed.

Frank, Circuit Judge, dissenting:

Disreg.. ding all testimony not favorable to the prosecution, we have this basic fact on which this conviction must stand or fall: Before Marshall, the government agent, met the defendant, the latter had never been guilty of the crime of illegal dealing in narcotics or of anything like it. He had been twice convicted on charges of gambling, a fact to which my colleagues do not refer, obviously because gambling is a crime so wholly different in character
295 that it must here be disregarded as a factor rebutting the defense of entrapment. So, to all intents and purposes, we have this simple case: A man, theretofore innocent of criminal wrong-doing, is easily persuaded by a federal detective to do an act which a criminal statute, read literally, makes a crime.

The following illustration will help to bring sharply into focus the problem we face here: Mr. Weak meets Mr. D. E. Coy at a bar. Unknown to Weak, Coy is a plain-clothes detective. Coy knows that Weak has never committed a crime. But, over some drinks, Coy drops a hint about the

two of them burglarizing a certain house. As the hint does not shock Weak, Coy more openly proposes the burglary. Weak agrees. The next night they break into the house. Coy then arrests Weak. At Weak's trial for burglary, he sets up the defense of entrapment. Is the defense no good because of Weak's willingness to accept Coy's proposal? My colleagues say, Yes. I think the Supreme Court says, No.

For the federal courts, the basic teaching on the entrapment doctrine is to be found in *Sorrells* v. *United States*, 287 U. S. 435. It tells us the following: Entrapment serves as a defense, not because of any merit in the defendant, but solely because the government may not validly (except with the express statutory approval of Congress) manufacture a crime. Only if the defendant's past conduct justifies the belief that, without persuasion by a government officer, the defendant would have committed that crime or a substantially similar crime, is that persuasion valid; it is then, and then only, proper as a means of obtaining evidence of a crime, like that which would have occurred in any event, but which might have been difficult to detect other than by setting a trap, for "artifice and stratagem may be employed to catch those engaged in criminal enterprises."

296 The minority opinion in *Sorrells'* case said that no statute could authorize the conviction of a person, previously innocent of a substantially similar crime, on evidence procured by trap-setting. The majority opinion did not go that far. It said that entrapment of such a person would be no defense if Congress specifically so provided. But the majority opinion declared that, when Congress has not explicitly so provided, an official inducement to do that which the statute literally forbids "takes the case out of the purview of the statute because it cannot be supposed that Congress intended that the letter of its statute should be used to support such a perversion of justice. * * * We are unable to conclude that it was the intention of the Congress in enacting this statute that its processes of detection and enforcement should be abused by the instigation by government officials of an act on the part of persons otherwise innocent in order to lure them to its commission and to punish them." In short, under any federal statute now on the books, such a govern-

mentally instigated act, on the part of a previously innocent person, is never a crime within the correct construction of the statute.*

In the light of *Sorrells'* case, I think that, in the instant case, the prosecution did not succeed in rebutting the entrapment defense. I can see no rational basis for the distinction, which my colleagues draw, between (1) a case where the officer's persuasion of the defendant is difficult and one where it is easy.

If that distinction maintains, the result will be that the federal police—instead of devoting themselves to the job of catching criminals—may, when it pleases them, spend their time and government money turning potential into actual criminals, shoving over into criminality men who may be hovering on its brink. I think the narcotics police
297 may not legitimately proceed on this principle (or unprinciple): "There a man likely some day to violate the Narcotics Act. Let's not wait to see whether he will. Let's incite him to do so and then nab him." This is neither the prevention of crime nor the detection and punishment of criminals. In such circumstances, the police have not caught a criminal; they have taught a man how to become a criminal. (Incidentally, what is their motive? Are criminals now in short supply? Do these federal police fear unemployment or believe they must make work for the judges lest they become loafers?)

If my colleagues' distinction between an easy and a difficult persuasion is adopted, how will it work? Just what is an easy seduction? What is its measure? After how long a period of official instigation is a defendant's literal infraction of a statute not a crime? Will it be a crime if he yields to a detective's blandishments at the end of two or three months but not if at the end of eight or ten?

My colleagues do not cite a single precedent in accord with their position. Their only mention of *Sorrells* is in a footnote to their discussion of the one case on which they rely, *United States* v. *Sherman*, 200 F. (2d) 880 (C. A. 2). We there decided that the defense of entrapment—a de-

* Presumably there would be same result with respect to a common law crime, if there were such a thing in the federal system.

fense to a charge of selling narcotics—had not been successfully rebutted by the prosecution because it had failed to show that Sherman had been in the habit of dispensing such drugs. Discussing *Sorrells*, we said that, once the accused proves that an official induced him to do the alleged illegal act, the prosecution has the burden of showing that the accused was "ready without any persuasion and was * * * awaiting any propitious opportunity to commit the offense," that he "did not need any persuasion." Certainly the prosecution made no such showing in the case at bar. Indeed, the prosecution in *Sherman* had a much stronger basis for rebutting the entrapment defense
298 than it has here. For, as we pointed out in *Sherman*, there the defendant, a drug addict, had been in the habit of illegally buying heroin for himself. True, in the course of discussing *Sorrells* in *Sherman's* case, we also used the expressions, quoted by my colleagues here, that the prosecution could discharge its burden by showing that "the accused was ready and willing to commit the offense charged whenever the opportunity offered," and that he "stood ready to procure heroin for anyone who asked for it." I think that my colleagues, by reading these expressions entirely out of their context, have misinterpreted the interpretation we gave *Sorrells* in *Sherman's* case.

---

299 IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*

v.

FRANK MASCIALE, *Defendant-Appellant*

Judgment—Aug. 22, 1956

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. Daniel Fusaro
Clerk

by Ralph C. Curcio
Deputy Clerk

---

300 Clerk's Certificate to foregoing Transcript

(Omitted in Printing)

---

301 SUPREME COURT OF THE UNITED STATES

(Title Omitted)

Order Extending Time to File Petition for Writ of Certiorari

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 22, 1956.

John M. Harlan
Associate Justice of the Supreme Court of the United States.

Dated this 13th day of September, 1956.

(Title Omitted)

Order Granting Leave to Proceed in Forma Pauperis and Petition for Writ of Certiorari—Feb. 25, 1957

ON PETITION FOR WRIT OF CERTIORARI TO the United States Circuit Court of Appeals for the Second Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 796.

And it is further ordered that the duly certified copy of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

February 25, 1957

☆ U. S. GOVERNMENT PRINTING OFFICE 1957—434404/P. O. 153

INDEX

SUBJECT INDEX

	Page
Opinions Below	1
Jurisdiction	1
Statutes Involved	2
Question Presented	2
Statement of the Case	3
Summary of Argument	6
ARGUMENT:	
I. There Was No Evidence of Any Prior Conduct on Petitioner's Part Showing a Predisposition or Criminal Design to Commit the Offense Charged. Accordingly, Judgment of Acquittal Should Have Been Entered	7
II. Even on the Question of Petitioner's "Willingness" There Was a Complete Failure of Proof	13
Conclusion	15
Appendix	16

AUTHORITIES

CASES CITED:

Abrams v. *U. S.*, 250 U. S. 616 (1919)	7
American Tobacco Co. v. *U. S.*, 328 U. S. 781 (1946)	7
Butts v. *U. S.*, 273 Fed. 35 (C. A. 8th 1921)	12
Cline v. *U. S.*, 20 F. 2d 494 (C. A. 8th 1927)	12
Morei v. *U. S.*, 127 F. 2d 827 (C. A. 6th 1942)	11, 12
Mortensen v. *U. S.*, 322 U. S. 369 (1944)	7
Sorrells v. *U. S.*, 287 U. S. 435 (1932)	6, 8, 11, 13
U. S. v. *Becker*, 62 F. 2d 1007 (C. A. 2d 1933)	8, 9
U. S. v. *Sherman*, 200 F. 2d 880 (C. A. 2d 1952)	9, 10, 11

STATUTES CITED:

18 U.S.C. §2	
21 U.S.C. §174	
26 U.S.C. §2553(a)	
26 U.S.C. §2554(a)	
28 U.S.C. §1254 (1)	

OTHER AUTHORITIES:

33 ALR 2d 884 (1954)	
31 St. John's L. Rev. 262 (19	

LIBRARY
SUPREME COURT, U.S.

FILED
SEP 9 195
JOHN T. FEY, Cle

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 84

FRANK MASCI LE,
Petitioner

vs.

UNITED STATES OF AMERICA.

BRIEF FOR PETITIONER

MERRELL E. CLARK, JR.
Counsel for Petitioner
c/o Winthrop, Stimson,
Putnam & Roberts
40 Wall Street
New York 5, New York

Page

2, 17
2, 16
2, 16
2, 17
1

8
8

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 84

FRANK MASCIALE,

Petitioner

vs.

UNITED STATES OF AMERICA

BRIEF FOR PETITIONER

Opinions Below

The opinions in the United States Court of Appeals for the Second Circuit are reported at 236 F. 2d 601 (1956) and are printed in the record at page 113. There was no opinion in the United States District Court for the Eastern District of New York.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The judgment of the Court of Appeals was entered on August 22, 1956 (R. 120). No petition for rehearing was filed. By order of Mr. Justice Harlan, dated September 13, 1956, the time for filing a petition for a writ of certiorari was extended to and including October 22, 1956 (R. 121) and said petition was filed on October 22, 1956, together with a motion for leave to proceed in forma

pauperis. The petition for a writ of certiorari and the motion for leave to proceed in forma pauperis were granted by order of this Court on February 25, 1957 (R. 122).

Statutes Involved

Petitioner was convicted of violations of 21 U.S.C. §174, 26 U.S.C. §§2553(a) and 2554(a)* and 18 U.S.C. §2. The first three sections relate to narcotics, and the fourth is a general definition of a "principal" in a criminal offense. These sections are set forth in the Appendix hereto.

Question Presented

Petitioner was convicted after a jury trial of unlawfully selling and conspiring to sell an ounce and a quarter of heroin hydrochloride, a narcotic drug. Petitioner did participate, though not directly, in the narcotic sale in question. His participation, however, was induced by Government agents, and his defense was that of entrapment.

The question presented is whether the trial court erred in refusing to direct a judgment of acquittal where the undisputed evidence showed that

a) Petitioner was induced by Government agents to participate in the narcotic sale,

b) Petitioner had not previously trafficked in narcotics and was not a user of narcotics, and

c) The urgings of the Government agents that petitioner commit the illegal acts continued for a period of over two months before petitioner actually did so,

and where the Government produced no substantial evidence that petitioner ever would have engaged in the

---

* References to Title 26 U.S.C. are to the 1939 Internal Revenue Code in effect during the period in question. Similar provisions are contained in the 1954 Code at 26 U.S.C. §§4704(a) and 4705(a).

narcotics trade but for the persuasion of the Government agents.

Statement of the Case

On March 2, 1954, there was a sale in Brooklyn of one and a quarter ounces of heroin hydrochloride and sugar (R. 10-13, 28). The purchaser of the heroin was a Government agent named Marshall (R. 10-13). The seller was never apprehended. He dealt through a middleman, and Marshall spoke to him only on the telephone (R. 10, 34-5). The middleman was Walter Seifert, who introduced Marshall to the seller on the telephone, took Marshall's money and led him to the place where the heroin had been left for him (R. 10-13). Petitioner's role in the transaction was to introduce Marshall to Seifert and to loan them his sister's car to aid in consummating the sale (R. 9-12).

Petitioner testified at the trial, and his testimony was uncontradicted, that he was persuaded to participate by the persistent urgings of Marshall and an employee of Marshall's named Kowel (also referred to as Paveleski). These urgings continued for a period of two months before the sale was finally made.

The story begins around the first of December, 1953, when Kowel walked into the office of Marshall, the Government agent (R. 16-7). Kowel advertised himself as familiar with the narcotics business, said he knew some "pushers" of narcotics (R. 17). He was hired by Marshall as a "special employee" (R. 16). Marshall paid him on an informal basis—"when I saw him and he said he was out and spent $5 or $10 the previous night at a bar or whatever he needed, that is the amount of money I would give him" (R. 17).

Kowel was not produced by the Government to testify at the trial; petitioner's testimony as to their relationship stands uncontradicted.

Petitioner had known Kowel for several years although he knew him under the name of Paveleski (R. 50-1). In December, 1953, or in the early part of January, 1954, Kowel met with the petitioner and introduced the subject of selling narcotics (R. 52, 56). His words to the petitioner were "Get hep to yourself. You can make a lot of money." (R. 56). Petitioner's uncontradicted testimony was that he "didn't want no part of that" and that he told Kowel he was not interested (R. 57).

Petitioner testified that he had never used narcotics and that he had never engaged in any narcotic transactions (R. 59, 85). This testimony was uncontradicted and the Government has not contended otherwise.

Over the next few weeks Kowel continued to talk to the petitioner about narcotics and to urge him to meet with a "buyer who was in the market to buy narcotics" (R. 58, 62-5). Kowel emphasized the money that was to be made and finally asked petitioner to meet his buyer and at least put up a front as if he were a big dealer in narcotics (R. 65). Petitioner consented, and the meeting took place in a bar and grill in Brooklyn on January 14, 1954 (R. 5-6, 67-8). The "buyer", of course, was Marshall, the Government agent.

Petitioner's relationship with Marshall continued for the next six weeks until the sale in question actually occurred. Both Marshall and the petitioner testified as to their meetings and telephone conversations during this period. Each supplied details not mentioned by the other, but there is no real contradiction whatsoever in their testimony. Both Marshall and the petitioner agree that the first conversation was about narcotics (R. 6, 69). Both petitioner and Marshall testified in substance that petitioner had said he could not obtain narcotics for Marshall at that time (R. 7, 69), and Marshall added that petitioner had said that

"primarily he was a gambler and that he was not a narcotics trafficker as such" (R. 7, 20).

Marshall said that he talked to the petitioner "at least ten times" during the succeeding weeks (R. 8). They met on two or three occasions and discussed petitioner's "inability to date of being able to introduce [Marshall] to the right source of supply" (R. 8-9, 71, 73, 80). On one such occasion Marshall loaned the petitioner $5.00 (R. 80-1). In addition, petitioner was called at least three times by Kowel and urged to continue looking for a seller of narcotics or at least to impress Marshall with the fact that he was so looking (R. 71-2, 79, 81). Petitioner testified that he told Marshall from time to time that he was trying to locate a seller of narcotics, but in fact, he was not so trying (R. 71, 80).

Towards the end of February, petitioner testified, Kowel called, urged the petitioner "not to spoil things for him," and asked the petitioner either to help him or to drop out of the picture. Petitioner replied in substance that he could not drop out of the picture—"I can't seem to get this man off my back now" (R. 81).

A day or two later Marshall called the petitioner, and the petitioner told him that he was going to see somebody in an effort to arrange a sale of narcotics (R. 82). This time the petitioner did in fact see somebody and that somebody was Walter Seifert (R. 82-3). Petitioner arranged a meeting between Seifert, Marshall and himself for March 1st (R. 83).

Seifert who had pleaded guilty and was awaiting sentence, testified as a Government witness (R. 30). He had first met petitioner some time after January 14th, the date of petitioner's first meeting with Marshall (R. 30, 38-9).

Having introduced Seifert to Marshall at the meeting on March 1st, petitioner's real participation in the trans-

action came to an end. Although he was present during the preliminary conversation, he was not with Marshall and Seifert when they telephoned the real seller of the narcotics (R. 10). It is true that the petitioner was on hand the next morning, March 2nd, when Seifert and Marshall met again, and it is true that the petitioner loaned his sister's car to Seifert (R. 10-1). But petitioner left the scene even before Marshall and Seifert had gone off together to obtain the drug, and he did not have any connection with the subsequent events (R. 11-2).

At the close of the prosecution's case, petitioner's counsel moved to dismiss (R. 48-9). When both sides had rested, he moved for a direct verdict (R. 96-7). Both motions were based on the evidence of entrapment. These motions (now called "motions for judgment of acquittal"—Rule 29(a)) should have been granted.

Summary of Argument

The narcotics offenses committed by petitioner were induced by Government agents. There was no evidence that petitioner had ever previously violated the narcotics laws or trafficked in narcotics. There was no evidence that petitioner had made any plans or preparations to violate the narcotics laws. Accordingly, there was not sufficient evidence from which the jury could have found that petitioner had the "predisposition and criminal design" referred to by this Court in *Sorrells* v. *U. S.*, 287 U. S. 435, 451 (1932).

The court below held in effect that petitioner's willingness to yield to the inducement of a Government agent was sufficient evidence in itself from which the jury might find that he had the requisite "predisposition and criminal design" and hence was not "entrapped." For the reasons stated so clearly in the dissenting opinion below, however, a willingness to be persuaded does not justify inducing the

commission of a crime and does not rebut the defense of entrapment (R. 117).

Furthermore, there was a failure of proof even on the question of petitioner's willingness. The Government produced no evidence whatsoever of the communications or relationship between petitioner and Kowel, the first Government agent to approach him. The testimony relied on by the Court of Appeals covered only the period after petitioner had first met Marshall, the second Government agent, a meeting which occurred several weeks after petitioner had been first approached. Thus, the record does not reveal whether, at the critical time of the first attempt to persuade him, petitioner was willing or otherwise to adopt the course urged on him by Kowel which led ultimately to narcotics violations.

ARGUMENT

I

There Was No Evidence of Any Prior Conduct on Petitioner's Part Showing a Predisposition or Criminal Design to Commit the Offense Charged. Accordingly, Judgment of Acquittal Should Have Been Entered.

On the trial of this action petitioner did not deny committing the acts with which he was charged. His defense was that of entrapment, and the trial judge submitted the issue of entrapment to the jury. Petitioner contends that there was no question for the jury and that his motion for a directed judgment of acquittal should have been granted. The question before this Court, therefore, is "whether there was any competent and substantial evidence fairly tending to support the verdict" on the issue of entrapment. *Mortensen* v. *U. S.*, 322 U. S. 369, 374 (1944). See also *American Tobacco Co.* v. *U. S.*, 328 U. S. 781, 787 (1946); *Abrams* v. *U. S.*, 250 U. S. 616, 619 (1919).

This Court has held that entrapment is a good defense in a criminal prosecution. *Sorrells* v. *U. S.*, 287 U. S. 435 (1932). The defense is a valid one because criminal statutes will not be construed so as to include within their prohibition conduct improperly induced by the Government (Id. at pp. 450-1).

But not every instance of inducement by Government officials gives rise to the defense of entrapment. The "controlling question," as framed in the *Sorrells* case, is "whether the defendant is a person otherwise innocent whom the Government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials" (p. 451). On that issue this Court said "The predisposition and criminal design of the defendant are relevant" and the defendant cannot complain of a searching inquiry "into his own conduct and predisposition as bearing upon that issue" (p. 451). This Court has not had occasion, since the *Sorrells* case, to speak further on the issue of entrapment, but the lower courts have discussed it in numerous cases. We submit that the decision below in the case at bar is a departure from principles established by this Court and heretofore followed by the other Federal courts. See 33 ALR 2d 884 (1954); 31 St. John's L. Rev. 262 (1957).

Shortly after the *Sorrells* decision, the Second Circuit Court of Appeals decided *U. S.* v. *Becker*, 62 F. 2d 1007 (1933). The opinion discussed the *Sorrells* case and earlier decisions of the lower Federal courts in an effort to decide what circumstances might be held to justify a government official in inducing the commission of a crime. The Circuit Court concluded:

> "The only excuses that courts have suggested so far as we can find, are these: an existing course of similar criminal conduct; the accused's already formed design

> to commit the crime or similar crimes; his willingness to do so, as evinced by ready complaisance" (p. 1008)

This passage has been cited and followed many times since by other Federal courts. The three excuses outlined there for instigating a crime were reaffirmed by the Second Circuit in its more recent decision, *U. S.* v. *Sherman*, 200 F. 2d 880 (1952). The proof that the prosecution has not seduced an innocent person may be provided "by evidence of his past offences, of his preparation, even of his 'ready complaisance'" (p. 882).

Neither the *Becker* nor *Sherman* cases held, however, that "ready complaisance" *alone* was sufficient to rebut the defense of entrapment. That question was expressly reserved in the *Becker* case:

> "But we do not wish to commit ourselves to the doctrine that mere readiness is enough * * * " (p. 1009).

And a reading of the *Sherman* opinion discloses that the case was sent back for a new trial because "there may be other evidence of Sherman's *dealings* in narcotics" (p. 883) (italics ours).

Nevertheless, in the case at bar, the court below has held that mere willingness to be induced is sufficient to rebut the defense of entrapment. The late Judge Frank in his dissent analyzed the majority view as follows:

> "Disregarding all testimony not favorable to the prosecution, we have this basic fact on which this conviction must stand or fall: Before Marshall, the government agent, met the defendant, the latter had never been guilty of the crime of illegal dealing in narcotics or of anything like it. He had been twice convicted on charges of gambling, a fact to which my colleagues do not refer, obviously because gambling is a crime so

wholly different in character that it must here be disregarded as a factor rebutting the defense of entrapment. So, to all intents and purposes, we have this simple case: A man, theretofore innocent of criminal wrong-doing, is easily persuaded by a federal detective to do an act which a criminal statute, read literally, makes a crime.

The following illustration will help to bring sharply into focus the problem we face here: Mr. Weak meets Mr. D. E. Coy at a bar. Unknown to Weak, Coy is a plain-clothes detective. Coy knows that Weak has never committed a crime. But, over some drinks, Coy drops a hint about the two of them burglarizing a certain house. As the hint does not shock Weak, Coy more openly proposes the burglary. Weak agrees. The next night they break into the house. Coy then arrests Weak. At Weak's trial for burglary, he sets up the defense of entrapment. Is the defense no good because of Weak's willingness to accept Coy's proposal? My colleagues say, Yes. I think the Supreme Court says, No" (R. 117-8).

In the case at bar, petitioner had no prior convictions for narcotics offenses. He was not a user of narcotics and had never trafficked in narcotics (R. 59, 85). The Government has not contended otherwise. It is true that petitioner had two prior convictions for gambling and one for conspiracy to commit a robbery which did not take place (R. 77, 89), but the court below did not refer to this criminal record, and, as Judge Frank in his dissent noted, it was "so wholly different in character that it must here be disregarded as a factor rebutting the defense of entrapment" (R. 117).

There was no evidence of any preparation or plan on the part of petitioner to deal in narcotics. In fact, the

record shows conclusively that he was unprepared. He had no narcotics of his own to sell. It took him from January 14 when he first met Marshall (R. 6) until March 1 to locate anybody who could provide Marshall with narcotics (R. 9). During the intervening six weeks Marshall, by his own testimony, spoke to petitioner at least ten times, met with him at least twice, and discussed petitioner's "inability to date of being able to introduce me to the right source of supply" (R. 8-9). And when petitioner did produce somebody, it was the middleman Walter Seifert who testified as a government witness that he had never met petitioner until "about a month" before March 1 or two weeks after petitioner first met Marshall (R. 30, 38-9). It is evident, therefore, that when Marshall first approached him, petitioner had no heroin himself, no source of obtaining it and no ready means of locating such a source.

The majority in the court below held, nevertheless, that there was sufficient evidence to satisfy the jury "'that the accused was ready and willing to commit the offense charged, whenever the opportunity offered'" (R. 116). They found this evidence in petitioner's apparent willingness to locate a source of narcotics for Marshall and in his efforts during the subsequent weeks to carry out this plan.

Such a holding, we submit, conflicts with sound and established principles. This Court in the *Sorrells* case clearly contemplated that a defendant's *past* conduct must be such as to justify the action of Government agents in inducing the commission of a crime. The opinion refers to "the conduct and purposes of the defendant *previous* to the alleged offense" (p. 451, italics ours). Other Federal courts have upheld the defense of entrapment where there was no showing of similar past offenses. *U. S.* v. *Sherman*, 200 F. 2d 880 (C. A. 2d 1952); *Morei* v. *U. S.*, 127 F. 2d

827 (C. A. 6th 1942); *Cline* v. *U. S.*, 20 F. 2d 494 (C. A. 8th 1927); *Butts* v. *U. S.*, 273 Fed. 35 (C. A. 8th 1921).

Of necessity, this must be the rule. If the defendant's previous conduct does not justify the entrapment, then the defense of entrapment becomes meaningless. Before the defense can be invoked, the defendant must have committed a crime and, absent fraud or duress, he must have willingly committed the crime. "There would be no such thing as entrapment unless a party had committed the offense charged." *Morei* v. *U. S.*, 127 F. 2d 827, 834 (C. A. 6th 1942). At some point, therefore, in the course of events preceding the commission of every crime induced by Government agents, the defendant must have yielded to persuasion and agreed to play his part. If the decision of the court below is followed, then it will become the jury's duty to determine the degree of resistance which the petitioner offered to the inducement by the Government. A Government official may attempt to persuade any person, regardless of his prior conduct or acquaintance with crime, to commit an offense, and the propriety of the official's acts will turn on how readily his subject yielded to the persuasion. Once the test becomes ease of persuasion, a defendant's guilt or innocence will depend as much on the skill of the persuader as upon his own "predisposition and criminal design."

To quote again from Judge Frank:

> "If my colleagues' distinction between an easy and a difficult persuasion is adopted how will it work? Just what is an easy seduction? What is its measure? After how long a period of official instigation is a defendant's literal infraction of a statute not a crime? Will it be a crime if he yields to a detective's blandishments at the end of two or three months but not if at the end of eight or ten?" (R. 119).

The "controlling question" of the *Sorrells* case was "whether the defendant is a person otherwise innocent whom the Government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials" (p. 451). The fact that a defendant has easily succumbed to the persuasion of a Government agent is in no way inconsistent with the proposition that he was "otherwise innocent." A crime committed by one who yielded easily to such persuasion is nevertheless "the product of the creative activity of [the Government's] own officials" unless it can be shown that the crime would have been committed without the persuasion.

II

Even on the Question of Petitioner's "Willingness" There Was a Complete Failure of Proof.

The court below based its holding on petitioner's apparent willingness to commit the offense as expressed at his first meeting with Marshall on January 14 and during the subsequent weeks. As to this there was testimony of Marshall and of the petitioner himself.

But the fact was that Marshall's "special employee" Kowel had for several weeks prior to January 14 been persuading the petitioner to meet with Marshall and to try to locate a source of narcotics for him (R. 52-68). Petitioner testified at length as to his dealings with Kowel. He testified that he said on several occasions that he wanted no part of a narcotics transaction and that when he finally did agree to meet Marshall, it was only "to string him along" as a favor to Kowel (R. 65, 87). Of course, the jury could disregard this testimony but if it is disregarded, we then have no proof whatsoever of the circumstances surrounding the Government's first approach to petitioner.

Kowel himself was not produced by the Government. We do not know, if petitioner's testimony is disregarded, what arts of persuasion were practiced on him, what resistance he made, what inducements were offered, or in fact anything at all about what transpired between petitioner and Kowel. It cannot possibly be said that there was any evidence that petitioner would, without Kowel's persuasion, have agreed even to meet Marshall.

The court below treated this argument lightly. The majority purported to accept petitioner's testimony that "he had consistently rebuffed Kowel's importunities" and noted his further testimony that at the time of the sale Kowel "was no longer in the picture" and "no longer concerned in the transaction" (R. 116). Ergo runs the implication, Kowel's persuasive efforts were of no significance and did not constitute any part of the Government's inducement. It is impossible, however, to believe that petitioner both (a) "consistently rebuffed" Kowel, and (b) simultaneously had a "predisposition and criminal design" to commit the crime suggested by him. Either he rebuffed Kowel (as he testified) and undertook initially to string Marshall along (as he testified), or he was in fact persuaded by Kowel and willingly took up Marshall's suggestion. Since, if we disregard petitioner's testimony the record is entirely silent as to his relationship with Kowel, there was no evidence of any kind from which the jury could have found that prior to his meeting with Kowel, petitioner had even a willingness to commit the offense in question, much less a "predisposition and criminal design."

Even if easy yielding to persuasion is alone sufficient to rebut the entrapment defense, it must be a yielding to the first persuader. A conviction cannot be permitted to stand solely on evidence of an easy yielding to the inducements of the *second* representative of the Government,

when the accused offers uncontradicted testimony that he yielded grudgingly and reluctantly to the inducements of the *first*.

Conclusion

The Judgment Below Should Be Reversed and the Case Remanded, With Instructions to Enter a Judgment of Acquittal.

Respectfully submitted,

/s/ MERRELL E. CLARK, JR.,
Merrell E. Clark, Jr.,
Counsel for Petitioner
c/o Winthrop, Stimson,
Putnam & Roberts
40 Wall Street
New York 5, New York

APPENDIX

Statutes

21 U.S.C. §174:

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.
>
> Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

26 U.S.C. §2553 (a):

> It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from narcotic drugs shall be prima

facie evidence of a violation of this subsection by the person in whose possession same may be found; and the possession of any original stamped package containing narcotic drugs by any person who has not registered and paid special taxes as required by sections 3221 and 3220 shall be prima facie evidence of liability to such special tax.

26 U.S.C. §2554 (a):

It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary.

18 U.S.C. §2:

(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

(b) Whoever causes an act to be done, which if directly performed by him would be an offense against the United States, is also a principal and punishable as such.

Office - Supreme Court, U.S.
FILED
DEC 30 1957
JOHN T. FEY, Clerk

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 84

FRANK MASCIALE,

Petitioner,

vs.

UNITED STATES OF AMERICA.

REPLY BRIEF FOR PETITIONER

MERRELL E. CLARK, JR.
Counsel for Petitioner
c/o Winthrop, Stimson,
Putnam & Roberts
40 Wall Street
New York 5, New York

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 84

FRANK MASCIALE,

Petitioner,

vs.

UNITED STATES OF AMERICA.

REPLY BRIEF FOR PETITIONER

Summary of Argument

The Government's brief makes two principal arguments:

(1) there was a conflict of evidence properly submitted to the jury to resolve, and

(2) it was unnecessary for the Government to show that petitioner had previously dealt in narcotics.

The second argument, we believe, is met squarely in our main brief and in Judge Frank's dissenting opinion below (R. 117) and needs no further discussion. The first, however, requires comment because it takes a view of the record that might otherwise be misleading to the Court.

ARGUMENT

There Was Not a Conflict of Proof but a Complete Failure of Proof on the Critical Issue of Petitioner's Willingness to Commit the Offense Charged.

The Government claims to find a "conflict" in the evidence on the issue of petitioner's willingness to commit the offense charged. The "conflict" is defined at pages 11 and 12 of the Government's brief, as follows:

> "On the one hand, there was testimony by the government, confirmed by some of petitioner's own testimony, that he was independently interested in engaging in the narcotics trade before Marshall, the government agent, posed as a buyer; and that petitioner showed himself eager to accomplish a sale when the buyer appeared. * * * On the other hand, there was petitioner's version that he had no thought of dealing in narcotics until Kowel put the idea in his mind."

We submit that this constitutes no conflict in the testimony whatsoever. The statements are entirely consistent because each refers to a separate incident in the course of events.

We conceded in our main brief that the jury might have found that petitioner was willing to engage in the transaction at the time of this meeting with Marshall and that the jury might have disregarded petitioner's testimony that he merely intended to "string him along" (Pet. Br. p. 13). However, petitioner's willingness at the time of the meeting with Marshall was in no way inconsistent with or in conflict with his uncontradicted reluctance to participate at the time he was first approached by Kowel.

It will be remembered that petitioner testified, entirely without contradiction, that Kowel, Marshall's special employee, had been urging petitioner over his protests for a period of several weeks to meet with Marshall (R. 52-68). Of course, as we have conceded, the jury could have disbelieved this testimony and disregarded it (Pet. Br. p. 13). But there was no other evidence to turn to on this subject, and the effect of disbelieving petitioner's testimony was to leave the record silent on his willingness to participate in a narcotics transaction at the critical time of the Government's first approach to him. Kowel did not testify at the trial and there was no evidence except petitioner's testimony as to the relationship between them. Accordingly, whether the jury believed petitioner's testimony or not, the Government failed to make a *prima facie* case on the issue of petitioner's willingness to commit the offense in question without persuasion.

In the body of its argument, the Government seeks to excuse this failure of proof by suggesting that it was up to the defendant to bring in Kowel as a witness. The Government's brief states:

> "It is significant that petitioner made no attempt to call Kowel as a witness. * * * It was petitioner's duty * * * to produce * * * Kowel as a witness * * *" (Resp. Br. p. 18).

The Government thus contends that it was up to the defendant to produce a witness whose testimony was essential to cure a failure in the Government's proof, or, in short, that the defendant had the burden of proving the Government's case. It is hard to take such a contention seriously; it is answered in the stating.

CONCLUSION

The Judgment Below Should Be Reversed and the Case Remanded, With Instructions to Enter a Judgment of Acquittal.

Respectfully submitted,

MERRELL E. CLARK, JR.
Counsel for Petitioner
c/o Winthrop, Stimson, Putnam & Roberts.
40 Wall Street
New York 5, New York

Office - Supreme Court, U.S.
FILED
SEP 18 1957
JOHN T. FEY, Clerk

No. 84

In the Supreme Court of the United States

OCTOBER TERM, 1957

FRANK MASCIALE, PETITIONER

v.

UNITED STATES OF AMERICA

On Writ of Certiorari To the United States Court of Appeals for the Second Circuit

---

BRIEF FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General,

WARREN OLNEY III,
Assistant Attorney General,

BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys,
Department of Justice,
Washington 25, D. C.

INDEX

Opinions below 1

Jurisdiction 1

Question presented 2

Statement 2

Summary of Argument 11

Argument 13

I. The evidence presented a factual issue for the jury as to whether petitioner intended to engage in the narcotics traffic whenever a likely buyer presented himself, prior to any suggestion by a government agent 14

II. The fact that petitioner was not shown to have dealt previously in narcotics does not per se establish the defense of entrapment 21

Conclusion 27

CITATIONS

Cases:

Andrews v. *United States*, 162 U.S. 420 20

Archambault v. *United States*, 224 F. 2d 925 21

Casey v. *United States*, 276 U.S. 413 20

Cratty v. *United States*, 168 F. 2d 844 24

Demos v. *United States*, 205 F. 2d 596, certiorari denied, 346 U.S. 873 24

Gilmore v. *United States*, 228 F. 2d 121 25

Goode v. *United States*, 159 U.S. 663 20

Grimm v. *United States*, 156 U.S. 604 20

Henry v. *United States*, 215 F. 2d 639 ..... 24, 25

Kivette v. *United States*, 230 F. 2d 749 21

Kott v. *United States*, 163 F. 2d 984, certiorari denied, 333 U.S. 837 21

Lunsford v. *United States*, 200 F. 2d 237 25

Nero v. *United States*, 189 F. 2d 515, certiorari denied, 342 U.S. 872 25

Newman v. *United States*, 299 Fed. 128 ..... 21, 24

Price v. *United States*, 56 F. 2d 135 24

Price v. *United States*, 165 U.S. 311 20

Rosen v. *United States*, 161 U.S. 29 20

Cases—Continued

	Page
Rucker v. *United States*, 206 F. 2d 464	21
Ryles v. *United States*, 183 F. 2d 944, certiorari denied, 340 U.S. 877	21
Sherman v. *United States*, 241 F. 2d 329, certiorari denied, 354 U.S. 911	21
Silva v. *United States*, 212 F. 2d 422	21
Sorrells v. *United States*, 287 U.S. 435	12, 19, 20, 22-23
Swallum v. *United States*, 39 F. 2d 390	24
United States v. *Becker*, 62 F. 2d 1007	26
United States v. *Brandenburg*, 162 F. 2d 980, certiorari denied, 332 U.S. 769	21
United States v. *De Marie*, 226 F. 2d 783, certiorari denied, 350 U.S. 966	25
United States v. *Johnson*, 208 F. 2d 404, certiorari denied, 347 U.S. 928	25
United States v. *Kendall*, 165 F. 2d 117	21
United States v. *Lemons*, 200 F. 2d 396	17
United States v. *Lindenfeld*, 142 F. 2d 829, certiorari denied, 323 U.S. 761	21, 24
United States v. *Perkins*, 190 F. 2d 49	24
United States v. *Polakoff*, 121 F. 2d 333, certiorari denied, 314 U.S. 626	21
United States v. *Roett*, 172 F. 2d 379, certiorari denied, 336 U.S. 960	25
United States v. *Sawyer*, 210 F. 2d 169	24
United States v. *Sherman*, 200 F. 2d 880	12, 25
United States v. *Socony-Vacuum Oil Co.*, 310 U.S. 150	14
United States v. *Spadafora*, 181 F. 2d 957, certiorari denied, 340 U.S. 897	21
Zucker v. *United States*, 288 Fed. 12, certiorari denied, 262 U.S. 756	16, 24

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 84

FRANK MASCIALE, PETITIONER

v.

UNITED STATES OF AMERICA

On Writ of Certiorari To the United States Court of Appeals for the Second Circuit

---

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The majority opinion of the Court of Appeals (R. 113-117) and the dissenting opinion (R. 117-120) are reported at 236 F. 2d 601.

JURISDICTION

The judgment of the Court of Appeals was entered on August 22, 1956 (R. 120-121). On September 13, 1956, Mr. Justice Harlan granted an extension of time within which to file a petition for a writ of certiorari until October 22, 1956, and the petition was filed on October 20, 1956 (R. 121). The

petition was granted on February 25, 1957 (R. 122). 352 U.S. 1000. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the trial court properly submitted the issue of entrapment to the jury, on the ground that there was sufficient evidence that petitioner, charged with participation in an unlawful sale of heroin, was predisposed to commit the offense and was ready and willing to do so when offered the opportunity.

STATEMENT

In the United States District Court for the Eastern District of New York, petitioner was found guilty by a jury (R. 110-111) on counts 2, 3, and 5 of a five count indictment (I 2-4) which charged him with participation in a sale of one ounce and 106 grains of heroin hydrochloride in violation of 26 U.S.C. 2553(a), 26 U.S.C. 2554(a), 21 U.S.C. 174, and 18 U.S.C. 2. Petitioner was sentenced to three years' imprisonment on each of counts 2, 3, and 5, the terms to run concurrently and was fined $100 on each of these counts (R. 111-112). The Court of Appeals affirmed, Judge Frank dissenting (R. 113-121).

Neither in the courts below nor in this Court has petitioner denied the sale and his participation. He claims, however, that he was entrapped. On this point, the evidence may be summarized as follows:

In late 1953, Gene Marshall, an agent of the Federal Bureau of Narcotics, engaged one Jack Kowel

as a special employee to locate "pushers" or sellers of narcotics (R. 16-17). Marshall testified that Kowel told him that he had a contact, "Chappie" (petitioner), for whom he had been intermediary in a sale of 700 ounces of quinine, and that "Chappie" had told Kowel "if he ever had anyone who was interested in purchasing narcotics, he should bring him over." Marshall then said to Kowel, "Let's go and see Chappie" (R. 18).

On January 14, 1954, at the Park Ridge Bar in Brooklyn, Kowel introduced Marshall to petitioner ("Chappie"). According to Marshall's testimony, "Chappie, Jack [Kowel] and I then sat down in one of the booths and almost immediately we started to discuss the narcotics traffic. I told Chappie that I was interested in large quantities of drugs, heroin to be exact, and not as a street pusher, * * * I posed as a seller out of New York City and I was only interested in good and large quantities, and he should tell me right away if he is not the person to see, then we will finish this conversation pleasantly right then and there" (R. 6-7). Petitioner questioned Marshall as to the extent of his dealings in the narcotics traffic. Petitioner stated that he was primarily a gambler and not a narcotics trafficker, but that he "knew the right people in the narcotics traffic". He explained that up to about one week before that time (January 14, 1954) he had a source for heroin, but that "somehow he had a falling out with these people". He also mentioned that he "knew someone whom he considered high up in the narcotics traffic"

who could supply Marshall with 88 percent pure heroin. Petitioner gave Marshall a telephone number where the agent could reach him (R. 7, 20). He told Marshall he was interested in making a narcotics sale since he "needed money" (R. 27).

During the next six weeks, Marshall spoke to petitioner about ten times, usually on the telephone. Petitioner reported that as yet he had been unable to locate a source of supply (R. 8, 21). On one occasion in January 1954, Marshall drove with petitioner at the latter's direction "all through Brooklyn", discussing the narcotics traffic and petitioner's inability to introduce Marshall to the right source of supply. At one point, petitioner alighted from the automobile, and upon his return "said that he had just seen someone who he thought was good, but that this person wouldn't help us out at this time but that we might be able to do something at a later date" (R. 8-9).

On March 1, 1954, petitioner arranged a meeting with Marshall and another agent, Finley, at a restaurant. According to the testimony of Seifert,[1] petitioner earlier that day had come to him as a source for narcotics (R. 31). Petitioner introduced the agents to Seifert, who asked petitioner if they were "O.K.", or trustworthy. Seifert offered to supply the agents with heroin at $400 per ounce (R. 9). It was agreed that Seifert was to "take care of Frank

---

[1] Seifert was a co-defendant who entered a plea of guilty and was sentenced on counts 3 and 5 of the indictment (R. 2, 30). He testified at the trial as a government witness (R. 30-42).

[petitioner]" by dividing $100 profit from the sale (R. 10, 33-34). Seifert made a telephone call to one Curtis, his source of supply, and delivery was planned the next morning, March 2, 1954 (R. 10, 34-35). At the rendezvous on this date at about 10 a.m., the agents found petitioner and Seifert waiting in a car owned by petitioner's sister. When Marshall hesitated at making a $200 partial payment in advance, petitioner assured the agents that Seifert was trustworthy, and loaned his (his sister's) car to Seifert while he (petitioner) remained with the agents to demonstrate Seifert's good faith (R. 10-11, 22). At about 12:30 p.m., petitioner left the agents to go to another appointment (R. 11, 46-47). At 2:00 p.m. Seifert returned, received the additional $200 payment, and told Marshall where he could pick up the heroin in a brown paper bag which was in a shoe box which had been placed in a Pepsi-Cola box (R. 12, 47). Chemical analysis disclosed that the package contained about 1¼ ounces of heroin hydrochloride (R. 28-29, 12-13, 14-16).

About March 5, 1954, Marshall telephoned petitioner to complain about the quality of the heroin and to state that the $400 price was exorbitant. Petitioner promised he would contact Seifert to straighten out the matter. Petitioner was arrested on April 5, 1954 (R. 23-24).

Petitioner testified at the trial that he first met Kowel, known to him under the name of Jake Paveleski, in 1950 (R. 50, 51). He said Kowel sold him garments and offered to sell him marijuana (R. 52). In the latter part of 1953, Kowel tried to get him to

sell quinine but petitioner never sold it although he pretended to make an effort (R. 56, 60, 63). In the quinine negotiations, petitioner testified, Kowel continuously and persistently importuned petitioner to engage in narcotics traffic, suggesting that a large amount of money could be made (R. 52, 56, 59, 63), but petitioner rejected all suggestions (R. 52, 57, 58, 59, 63, 65, 66, 67). Ultimately, Kowel told him that he had a narcotics buyer with a lot of money, "something big" (R. 64). Responding to the question, "Did he [Kowel] say anything to you about your putting up a front"?, petitioner testified that Kowel told him to pose as a "big narcotics handler * * * influenced with a lot of people" (R. 65). Petitioner claimed that Kowel wanted him to impress Marshall that he (Kowel) could produce narcotics (R. 68, 72, 88). Petitioner testified that he refused at first but finally agreed with Kowel to meet Marshall (R. 65-68). He admitted getting Marshall's hotel telephone number at the meeting on January 14, 1954, but denied that he had given his (R. 67, 69-70). Petitioner admitted that on the following day, in the absence of Kowel, he told Marshall that he was "trying" to get narcotics, but testified that he was not actually trying (R. 70-71). He testified that he received telephone calls from Marshall and Kowel requesting action (R. 71, 72), and stated that on February 12 or 15, 1954, he received "$200 or $400" from Marshall but later returned the money since he had only pretended to have a narcotics buyer. Petitioner explained that his purpose was "to impress him [Marshall]" and "not to make Jake [Kowel] a

fool" (R. 74-76, 94). Petitioner testified that one week before the sale alleged in the indictment (on March 2, 1954) Marshall accused him of not trying, but he assured him that he was trying (R. 80). He also told Marshall that he had a new prospect (Seifert), and that he thought he could get some narcotics from him (R. 82).

On cross-examination, petitioner admitted he had not spoken to Kowel before he talked with Seifert about narcotics, and that, so far as he (petitioner) knew, Kowel was "no longer in the picture" (R. 85-86), and "no longer concerned in the transaction" (R. 92). Petitioner admitted that he asked Seifert whether he could obtain narcotics (R. 95-96); and that he introduced Marshall to Seifert for the purpose of arranging the narcotics sale (R. 85). Petitioner denied knowing any gamblers, and said that his statement to Marshall that he knew about narcotics through his gambling contacts was Kowel's doing (R. 89). He admitted two previous convictions on gambling charges (R. 89). On direct examination, he admitted conviction on a plea of guilty of a conspiracy to commit robbery (R. 77). He said he told Marshall he needed money to pay his lawyer (R. 87).

2. With respect to entrapment, the trial court charged the jury as follows:

> The burden of the defense challenges your most careful attention. The defense relies on what is called entrapment. Now, that means that the defendant asserts that the testimony shows that the sale of these narcotics, or of this

package of narcotics, was brought about because the Government induced the defendant to play whatever part he did play in that transaction, and from that the defendant argues that since the Government—and the testimony I will discuss in a moment—since the Government was the active agency in bringing about this transaction the defendant must be turned loose; he must be found not guilty.

Now, that is not the law. The law says that the Government may provide the means whereby a violation of the law is established but it may not poison the mind of a person who would not otherwise indulge in that conduct, and then hold him to be guilty.

In other words, the task of the jury is to ascertain from the evidence in the case whether this defendant was ready and willing to participate in this sale of narcotics, or whether he was not ready and willing; whether there was not in his mind an acquiescence or a willingness to go through with an illegal transaction.

Now, that isn't too easy an idea to wrestle with, and so I mention it at the outset so that you will follow the rest of the charge with that initial suggestion in mind. [R. 97-98.]

* * * *

Now I will go back to that subject that I mentioned at the outset—this question of entrapment—and I do that because, as I must remind you, the defense does not dispute the transaction related by the Government witnesses—the sale and delivery of this package of heroin. The defendant's case turns upon this question of whether he was induced, being otherwise not inclined, to disobey this branch of the law; that

he was induced to do it, first, through interviews with this person who is known to us by two names, Jack Kowel and Jack Paveleski. * * * [R. 103.]

* * * *

Now, the general subject of the interview of course was the purchase of narcotics, and I don't understand—and if I am wrong disregard what I say—I don't understand that the defendant denies that. He told you at great length of a series of interviews, personal and over the telephone, between him and this man Kowel, that preceded the interview of January 14, and thus we have the defendant's version that this purchase was suggested to him by the Government.

Since Kowel is not a witness and Marshall has told you that Kowel was there you may wish to accept the defendant's version of Kowel's initial suggestion to him.

I told you at the outset that the law is that if the Government does the inducing the Government then must demonstrate to you that the defendant was not averse to going along; that the defendant was willing to follow up and to do whatever was required in order to bring about a sale of this heroin. The subject has received the attention of the courts from time to time and because I think it may help you to reach a conclusion I am going to ask you to listen while I read a few passages from the opinion in the case of the United States vs. Sherman, 200 Fed. Reporter, 2nd, at Page 880, which was also a narcotics case, and I am reading from Page 882 where reference is made to

a Supreme Court decision, and this language was used:

"The controlling question is whether the defendant is a person otherwise innocent whom the Government is seeking to punish for an alleged offense which is the creative activity of its own officials."

Continuing, the opinion from which I am reading says:

"We suggested three excuses for an inducement. An existing course of similar criminal conduct; the accused [sic] already formed design to commit the crime or similar crimes; his willingness to do so as evidenced by a ready complaisance."

Now, again from the same page:

"As we understand the doctrine it comes down to this: That it is a valid reply to the defense"—that is, the defense of entrapment—"if the prosecution can satisfy the jury that the accused was ready and willing to commit the offense charged whenever the opportunity offered. In that event the inducement which brought about the actual offense was no more than one instance of the kind of conduct in which the accused was prepared to engage; and the prosecution has not seduced an innocent person but has only provided the means for the accused to realize his pre-existing purposes. The proof of this may be by evidence of his past offenses, of his preparation, even of his ready complaisance. Obviously it is not necessary that the past offenses proved shall be precisely the same as that charged, provided they are near enough in kind to support an inference that his purpose included offenses of the sort charged."

> Please accept that as the law. It will be for you to say, having examined the evidence, having listened to the testimony of the witnesses, whether this defendant has been shown by the margin of proof that I have explained to have been "ready and willing" to commit the offense charged. [R. 104-105.]

SUMMARY OF ARGUMENT

Petitioner's argument that the issue of entrapment should not have been submitted to the jury rests on the erroneous factual assumption that the jury was bound to accept his testimony concerning Kowel's inducements to him, and on the erroneous legal theory that predisposition to commit a crime had to be proved by previous offenses.[2] Neither assumption is justified.

I.

The evidence before the jury presented a conflict on the issue of entrapment. On the one hand, there was testimony by the government, confirmed by some of petitioner's own testimony, that he was independently interested in engaging in the narcotics trade before Marshall, the government agent, posed as a buyer; and that petitioner showed himself eager to accomplish a sale when the buyer appeared. On this evidence, the offer by the government agent to buy was merely an offer to a person who already had the criminal design, merely enabling him to execute his

---

[2] Petitioner does not attack the trial court's instructions on entrapment (*supra*, pp. 7-11).

previous purpose. On the other hand, there was petitioner's version that he had no thought of dealing in narcotics until Kowel put the idea in his mind. The conflict was one for the jury to resolve. *Sorrells* v. *United States*, 287 U.S. 435. The jury was not obliged to believe petitioner's self-serving testimony which was replete with inner contradictions. It could reasonably conclude, on the basis of the evidence favorable to the prosecution, that petitioner had not been entrapped.

II.

The fact that petitioner was not shown to have previously dealt in narcotics does not *per se* establish the defense of entrapment. The issue is whether a person otherwise innocent has been induced to commit crime by the creative activity of government officials. *Sorrells* v. *United States*, 287 U. S. 435, 451-2. Proof of prior similar action would be relevant as tending to disprove innocence on the part of the defendant. But proof of prior similar action is not the only way to show that the intention to commit the crime originated with the defendant, and not with the government officials. It is impossible to categorize all the types of proof that could be relevant on such an issue. The test must always be, in a particular case, whether the evidence is relevant to the central issue as defined in *Sorrells*. Judge Learned Hand did, however, in *United States* v. *Sherman*, 200 F. 2d 880 (C.A. 2), summarize the usual types of evidence that would show prior criminal predisposition, and it was on the theory of *Sherman* that

this case was submitted to the jury. As shown in Point I, the government's evidence reasonably supports the finding of the jury that the criminal intent was the product of petitioner's mind, and not the result of the government's creative activity. No talismanic class of evidence—such as prior offenses or dealings in narcotics—is essential or required.

ARGUMENT

The jury has found, on the evidence, that petitioner was not entrapped; that, although the suggestion for the actual narcotics sale first came from the government, petitioner was shown beyond a reasonable doubt to have been "ready and willing" to commit the offense charged.[3] In arguing that the issue should not have been submitted to the jury, petitioner is in effect saying that no group of reasonable men could, on this evidence, have reached that conclusion. The issue at this stage is not what a court, faced with the duty of resolving evidence, might itself have concluded with respect to that evidence. The question is whether there was sufficient

---

[3] The judge had told the jury that the issue was whether petitioner, not otherwise so inclined, was induced to disobey the law through the inducement of Kowel (R. 103). His final words on this issue were "It will be for you to say, having examined the evidence, having listened to the testimony of the witnesses, whether this defendant has been shown by the margin of proof that I have explained to have been 'ready and willing' to commit the offense charged" (R. 105). See *supra*, pp. 7-11.

Petitioner does not challenge the trial court's instructions. See Pet. Br. 2, 7-15.

evidence to submit the issue to the jury for its determination. As this Court said in *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 254, a motion for a directed verdict raises a question of law "which entails an examination of the record, not for the purpose of weighing the evidence but only to ascertain whether there was some competent and substantial evidence before the jury fairly tending to sustain the verdict."

Petitioner's attack upon the sufficiency of the evidence with respect to entrapment has two facets. On the facts, he assumes that the jury was bound to accept his own version of his dealings with Kowel and to reject the prosecution's testimony; on the law, he assumes that the mere fact that he had not previously been shown to have engaged in the narcotics trade necessarily negatived any criminal predisposition to commit the offense and was in itself conclusive that the sale initiated by the government agents was the result of entrapment. Neither assumption is justified.

I. *The evidence presented a factual issue for the jury as to whether petitioner intended to engage in the narcotics traffic whenever a likely buyer presented himself, prior to any suggestion by a government agent.*

1. From the point of view of Marshall, the government narcotics agent and chief witness for the prosecution, this is what occurred:— An informant, Kowel, reported that petitioner, with whom he had had dealings in quinine, had said "if he [the informant] ever had anyone who was interested in purchasing narcotics, he should bring him over" (R. 18).

Since this indicated that petitioner had a source of narcotics, the agent felt justified in pursuing the matter. Then, when the agent met petitioner, the conversation immediately turned to narcotics, thus confirming Kowel's information that petitioner was ready to deal in that commodity. Petitioner further confirmed that information by saying that, while primarily he was a gambler, "he knew the right people in the narcotics traffic"; that he knew "someone whom he considered high up in the narcotics traffic." (R. 7).[4] Petitioner also mentioned that he was interested in making money, and exchanged telephone numbers with Marshall so that they could keep in touch with each other (R. 27, 7, 69-70). The next day, according to petitioner's own testimony, he assured Marshall that he was "trying" to find a source of supply for narcotics (R. 70-71). Thereupon, for the next six weeks prior to the ultimate sale, petitioner voluntarily exerted his best efforts to obtain a source of supply. Petitioner had told Marshall that he had had a falling out with those he once knew (R. 7) and it evidently took him some time to make a new contact. The agent, in calling petitioner dur-

[4] The evidence just recited—for example, petitioner's remark to Kowel that if the latter knew anyone interested in buying narcotics he should "bring him over" (see the Statement, *supra*, pp. 3-4)—discloses that the idea of dealing in narcotics was in petitioner's mind prior to the time he was approached by any government agent. This is contrary to the assumption of fact upon which the dissent below is predicated, *i.e.*, that, despite petitioner's ready complaisance, the thought of dealing in narcotics was first implanted by a government agent. The evidence favorable to the prosecution belies that theory.

ing the six weeks before the sale, was not calling a reluctant person in order to induce a crime. The agent was keeping in touch with a person who appeared to him eager to make a sale in order to get, as the agent ultimately did, to the source of illegal supply. From what was known to him about petitioner, Marshall had no reason to suspect that he would be inducing an innocent man to commit a crime. Certainly, the jury could properly have believed that Marshall had reason to think that he was dealing with a willing, eager, potential seller of narcotics.[5]

2. Petitioner does not really dispute the fact that Marshall, the government agent, did not persuade him to commit the crime. He admitted on the stand that he posed to Marshall as a big dealer. His defense centered, rather, on his testimony concerning inducement by Kowel before Marshall came into the pic-

---

[5] See *Zucker* v. *United States*, 288 Fed. 12, 16-17 (C.A. 3), certiorari denied, 262 U.S. 756, where the court said:

"While the government officials were persistent in having Zucker bring them into communication with persons from whom they could secure alcohol, yet when they approached him, although he said that he did not handle it himself, he did not hesitate to communicate with the other defendants and have them enter into negotiations for the sale of alcohol. * * * While the government officials went to his store quite a number of times, it does appear that Zucker was never really induced and lured into committing the crime against his will, but, on the contrary, from the very start he was willing to assist the officials in entering into an arrangement with the defendants to purchase the alcohol. He was apparently willing to go along and assist in the enterprise, provided he saw the money. He nowhere appeared unwilling to help. The delay seemed due to tardiness in producing the money to consummate the deal."

ture or at times when Marshall was not there. The approach throughout the proceedings was that his own testimony as to his relations with Kowel had to be credited in full and that on this basis the defense of entrapment had been established. Thus, his motion to direct a verdict of not guilty was predicated on the ground that he "never had any thought in mind" of making a sale of narcotics until Kowel implanted the idea (R. 96-97). In his motion to set aside the verdict, petitioner's attorney argued (R. 111):

> The testimony of the defendant with reference to these conversations had with Jack Pavelski [Kowel], by whom he alleges he was induced to enter into this conspiracy to sell the narcotics was uncontroverted. It was believable as a matter of law. It was not subject to suspicion, and it is probable that it occurred as set forth by this defendant during his testimony, and the verdict of the jury is contrary to its weight.

The jury was not, however, bound to credit the whole of petitioner's version of his conversations with Kowel. See *United States* v. *Lemons*, 200 F. 2d 396, 398 (C.A. 7). It had many inconsistencies. For instance, petitioner said that although Kowel tried to get him to sell quinine he never did; that although Kowel had previously tried to get him to deal in narcotics he refused. Yet, in his own version, despite all this prior unwillingness to fall in with Kowel's plans, he was the one to whom Kowel turned when Kowel wanted someone to pose as a big narcotics dealer. Further, he admitted that,

when he actually arranged for the sale of narcotics, Kowel was not in the "picture" at all. Kowel did not introduce him to Seifert and Kowel did not take part in the sale (R. 85-86, 92). *Supra*, pp. 4-5, 7.

It is significant that petitioner made no attempt to call Kowel as a witness. He apparently knew where he was. On cross-examination of the government agent, petitioner's attorney asked when the agent had last seen Kowel. After the agent testified that in the spring of 1951 Kowel had said he was going to California, petitioner's attorney asked: "As a matter of fact, Mr. Marshall, didn't he leave his wife and children and go to the West Coast by himself" (R. 19). It was petitioner's duty, and not the government's, to produce, or make an effort to produce, Kowel as a witness if he believed Kowel would substantiate his own testimony. From the government's point of view, Kowel was merely the means of bringing Marshall, the government agent, to petitioner. The agent's testimony thereafter related to his direct dealings with petitioner. It was petitioner's defense testimony which made Kowel—and his relations with petitioner—a prime issue. Petitioner chose to rely solely on his own testimony with respect to his dealings with Kowel in support of his position on that issue. It was for the jury to decide whether to credit his testimony or not, and, in the main, it clearly disbelieved his self-serving version of the events and believed the evidence favorable to the prosecution.[6]

---

[6] As the Court of Appeals observed (R. 116), the jury was entitled to take into account, in evaluating the proofs

3. In short, this is, at bottom, simply another case in which the evidence presented a conflict which was for the jury to resolve. On the one hand, there was the government's evidence that petitioner was ready to engage in the narcotics traffic as soon as a likely buyer presented himself, that he expressly invited approaches, and that he was eager to accomplish a sale when the buyer appeared. In the light of this evidence the suggestion that petitioner make the sale to Marshall was an offer to a person who already had the criminal intent, and merely enabled him to carry out his previous design. On the other hand, there was petitioner's version that he had no thought of dealing in narcotics until Kowel put the idea into his mind; that he still did not think of dealing in narcotics when he first met Marshall but was merely posing; that only later, even though Kowel was "no longer in the picture," he decided to go through with a sale of narcotics. The jury cannot be said to have been unreasonable in failing to credit petitioner's version of events and in accepting that of the prosecution witnesses. There is therefore no occasion to set aside its verdict.

That the issue was one for the jury, and not for the court, is clear from this Court's decision in *Sorrells* v. *United States*, 287 U.S. 435, the leading case

---

on entrapment, petitioner's testimony that he had consistently rebuffed the importunities he said that Kowel made. Together with the prosecution's evidence, this testimony supports the jury's finding that petitioner was not persuaded by Kowel to engage in crime, but that he already had the necessary criminal predisposition.

on entrapment.[7] There, a secret government agent, who had been in the same army division with the defendant during World War I, visited his house as a guest and, while visiting, asked him to procure some liquor about three or four times before the defendant finally went out and did procure some liquor. The agent admitted that his purpose was to prosecute the defendant for procuring and selling the liquor. There was no evidence that the defendant had ever possessed or sold liquor prior to this, although there was evidence that he had a reputation as a rum runner. The Court held that the trial court erred in holding as a matter of law that there was no entrapment, and that the issue should have been submitted to the jury. It is significant, too, that the Court did not direct an acquittal on the basis of the strong showing of entrapment made by Sorrells, but remanded the issue for trial. On the evidence in the

---

[7] Previous to the *Sorrells* decision, in cases arising under the postal laws in which government officers, having information that the law was being violated, had written decoy letters asking the accused to send obscene matter through the mails, this Court held that such inducement is no defense in a prosecution for acceding to the officer's request. *Rosen* v. *United States*, 161 U.S. 29, 42; *Andrews* v. *United States*, 162 U.S. 420, 423; *Price* v. *United States*, 165 U.S. 311, 315. For other cases recognizing the validity of decoy letters in obtaining prosecutions, see *Grimm* v. *United States*, 156 U.S. 604, 610-611; *Goode* v. *United States*, 159 U.S. 663, 669. In *Casey* v. *United States*, 276 U.S. 413, 418-419, the majority, speaking through Mr. Justice Holmes, refused to hold that the defense of entrapment had been established, upon its own motion and upon a record which was not intended to present that question.

present record, there was at least as much of a jury issue here as there was in *Sorrells*.[8]

II. *The fact that petitioner was not shown to have dealt previously in narcotics does not per se establish the defense of entrapment.*

There runs through petitioner's brief—and, in part, through Judge Frank's dissent below—the thought that the mere fact that petitioner had not previously been shown to have engaged in narcotics, in itself, was sufficient to establish his defense of entrapment.

To the extent that this argument rests on the factual assumption that petitioner had no idea of dealing in narcotics until approached by Kowel—an assumption made by the dissenting opinion below (see fn. 4, *supra*, p. 15)—it rests on a view of

---

[8] There are numerous lower court decisions upholding convictions where the entrapment issue was submitted to the jury under conflicting evidence. *E.g., Sherman* v. *United States*, 241 F. 2d 329, 333 (C.A. 9), certiorari denied, 354 U.S. 911; *Kivette* v. *United States*, 230 F. 2d 749, 754 (C.A. 5); *Archambault* v. *United States*, 224 F. 2d 925, 929 (C.A. 10); *Silva* v. *United States*, 212 F. 2d 422 (C.A. 9); *Rucker* v. *United States*, 206 F. 2d 464 (C.A. D.C.); *Ryles* v. *United States*, 183 F. 2d 944 (C.A. 10), certiorari denied, 340 U.S. 877; *United States* v. *Spadafora*, 181 F. 2d 957, 958-959 (C.A. 7), certiorari denied, 340 U.S. 897; *United States* v. *Kendall*, 165 F. 2d 117 (C.A. 7); *Kott* v. *United States*, 163 F. 2d 984, 987-988 (C.A. 5), certiorari denied, 333 U.S. 837; *United States* v. *Brandenburg*, 162 F. 2d 980, 981-982 (C.A. 3), certiorari denied, 332 U.S. 769; *United States* v. *Lindenfeld*, 142 F. 2d 829, 831 (C.A. 2), certiorari denied, 323 U.S. 761; *United States* v. *Polakoff*, 121 F. 2d 333, 335 (C.A. 2), certiorari denied, 314 U.S. 626; *Newman* v. *United States*, 299 Fed. 128, 131-132 (C.A. 4).

the evidence which the jury was not required to adopt. As pointed out *supra*, pp. 14-18, there was testimony favorable to the prosecution, which the jury was free to credit, that petitioner had formed the design of engaging in the narcotics traffic before he met Marshall as a potential buyer, and independently of his dealings with Kowel. His conduct when he met Marshall was entirely consistent with that view.

As a matter of law, it is clear that the mere fact that the sale comes at the instance of a government agent does not show entrapment. The *Sorrells* case, *supra*, 287 U.S. 435, involved a situation where there was no proof of prior similar criminal activity by the defendant. In the majority opinion of Chief Justice Hughes, it was said (pp. 441-442):

> It is well settled that the fact that officers or employees of the Government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution. Artifice and stratagem may be employed to catch those engaged in criminal enterprises. [Citing cases]. The appropriate object of this permitted activity, frequently essential to the enforcement of the law, is to reveal the criminal design; to expose the illicit traffic, the prohibited publication, the fraudulent use of the mails, the illegal conspiracy, or other offenses, and thus to disclose the would-be violators of the law. A different question is presented when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the al-

leged offense and induce its commission in order that they may prosecute.

And later, in speaking of the defense of entrapment, the opinion continues (pp. 451-452):

> * * * *For the defense of entrapment is not simply that the particular act was committed at the instance of government officials.* That is often the case where the proper action of these officials leads to the revelation of criminal interprises. [Citing case]. *The predisposition and criminal design of the defendant are relevant.* But the issues raised and the evidence adduced must be pertinent to the controlling question whether the defendant is a person otherwise innocent whom the Government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials. If that is the fact, common justice requires that the accused be permitted to prove it. The Government in such a case is in no position to object to evidence of the activities of its representatives in relation to the accused, and if the defendant seeks acquittal by reason of entrapment he cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue. If in consequence he suffers a disadvantage, he has brought it upon himself by reason of the nature of the defense. [Emphasis added.]

The real issue under *Sorrells* is "whether the defendant is a person *otherwise innocent* whom the Government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials." (Emphasis added.) Although the

initial action leading to commission of the offense comes from the government agent or informer, there is no entrapment if other evidence shows that the criminal design originated with the accused or existed prior to the dealings with the government agent. *E.g., Henry* v. *United States*, 215 F. 2d 639, 640 (C.A. 9); *Demos* v. *United States*, 205 F. 2d 596, 597-598 (C.A. 5), certiorari denied, 346 U.S. 873;[9] *United States* v. *Perkins*, 190 F. 2d 49, 50-51 (C.A. 7); *Cratty* v. *United States*, 163 F. 2d 844, 851 (C.A. D.C.); *United States* v. *Lindenfeld*, 142 F. 2d 829, 830-831 (C.A. 2), certiorari denied, 323 U.S. 761; *Price* v. *United States*, 56 F. 2d 135, 136 (C.A. 7); *Swallum* v. *United States*, 39 F. 2d 390, 391, 392 (C.A. 8). This may be true even though the government agent or the informer repeats a suggestion on several occasions before the accused commits the offense. Cf. *United States* v. *Sawyer*, 210 F. 2d 169, 170-171 (C.A. 3); *Zucker* v. *United States*, 288 Fed. 12, 13-17 (C.A. 8), certiorari denied, 262 U.S. 756; *Newman* v. *United States*, 299 Fed. 128, 129-130 (C.A. 4).[10]

Proof of prior similar action would of course be relevant as tending to disprove innocence on the part

---

[9] In *Demos*, the court states (205 F. 2d at 599): "For the offense to originate in the mind of the defendant, it was not necessary that the defendant be the instigator of the particular sale or act, but only that she have the general intention to commit such an offense whenever the opportunity offered."

[10] See, also, the Brief for the United States in *Sherman* v. *United States*, No. 87, this Term, at pp. 13-14, 16-17.

of the defendant."[11] But proof of such prior similar action is not the only way to show that the intention to commit the crime originated with the defendant, rather than with the agent. Every first offender who deals with an agent is not entrapped. Any evidence which has a logical bearing on the central issue—an innocent mind induced into crime by the creative activity of government officials—is pertinent to that issue. Conversely, any evidence sufficient to convince reasonable men beyond a reasonable doubt of the defendant's lack of innocence is sufficient to negative the defense of entrapment; no special type of evidence is essential or required. No attempt at categorization would completely cover all the types of evidence that could have a bearing on the central issue. Judge Learned Hand did, however, summarize the usual classes of pertinent evidence in his opinion in *United States* v. *Sherman*, 200 F. 2d 880, 882-883. (C.A. 2). In construing *Sorrells*, he said:

> As we understand the doctrine it comes to this: that it is a valid reply to the defence, if the prosecution can satisfy the jury that the accused was ready and willing to commit the offence charged, whenever the opportunity of-

---

[11] *Gilmore* v. *United States*, 228 F. 2d 121, 122 (C.A. 5); *United States* v. *De Marie*, 226 F. 2d 783, 785 (C.A. 7), certiorari denied, 350 U.S. 966; *Henry* v. *United States*, 215 F. 2d 639, 641 (C.A. 9); *United States* v. *Johnson*, 208 F. 2d 404, 406 (C.A. 2), certiorari denied, 347 U.S. 928; *Lunsford* v. *United States*, 200 F. 2d 237, 239 (C.A. 10); *Nero* v. *United States*, 189 F. 2d 515, 516 (C.A. 6), certiorari denied, 342 U.S. 872; *United States* v. *Roett*, 172 F. 2d 379, 380-381 (C.A. 3), certiorari denied, 336 U.S. 960.

> fered. In that event the inducement which brought about the actual offence was no more than one instance of the kind of conduct in which the accused was prepared to engage; and the prosecution has not seduced an innocent person, but has only provided the means for the accused to realize his preexisting purpose. The proof of this may be by evidence of his past offences, of his preparation, even of his "ready complaisance."[12] Obviously, it is not necessary that the past offences proved shall be precisely the same as that charged, provided they are near enough in kind to support an inference that his purpose included offences of the sort charged.
>
> * * * *
>
> Therefore in such cases two questions of fact arise: (1) did the agent induce the accused to commit the offence charged in the indictment; (2) if so, was the accused ready and willing without persuasion and was he awaiting any propitious opportunity to commit the offence. On the first question the accused has the burden; on the second the prosecution has it. * * *

It was under the rule of this *Sherman* opinion that this case was submitted to the jury. See the Statement, *supra*, pp. 8-11. As we have shown in Point I, *supra*, pp. 14-21, there was sufficient evidence favorable to the prosecution—regarding petitioner's ac-

---

[12] In the earlier case of *United States* v. *Becker*, 62 F. 2d 1007, 1008 (C.A. 2), Judge Hand, in defining the possible proof of an accused's preexisting purpose to commit the offense, had used this slightly different language: "an existing course of similar criminal conduct; the accused's already formed design to commit the crime or similar crimes; his willingness to do so, as evinced by ready complaisance."

tions and declarations—to justify the jury in finding, beyond a reasonable doubt, that "the prosecution [had] not seduced an innocent person but [had] only provided the means for the [petitioner] to realize his pre-existing purposes" (R. 105). In these circumstances, proof of prior dealings in narcotics was not essential.

CONCLUSION

It is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

J. LEE RANKIN,
Solicitor General.

WARREN OLNEY III,
Assistant Attorney General.

BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

SEPTEMBER 1957.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1957 436156 340